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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1170

J. R. McLEOD,

Petitioner,

vs.

THE CITY OF JACKSON, MISSISSIPPI, A MUNICIPAL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Justices of the Supreme Court of the United States:

The above named petitioner respectfully petitions for a writ of certiorari to review a decision of the Supreme Court of the State of Mississippi (*The City of Jackson, Mississippi,* v. *J. R. McLeod,* 24 Sou. (2d) 319 Adv. Sheets), rendered on January 14, 1946. Such decision reversed a judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi, in favor of petitioner, the appellee in the Mississippi Supreme Court and rendered a final judgment in favor of the appellant, The City of Jackson, Mississippi.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case grows out of the discharge of the petitioner, a citizen of the United States and a resident of Jackson, Mississippi (R. 25, 132), from the police force of the City of Jackson, Mississippi, for the sole reason that the petitioner had expressed an intention of becoming a member of the American Federation of State, County and Municipal Employees. That organization is a labor union which expressly forbids its members who are employed as policemen from striking, threatening to strike, or from using any coercion or threats of coercion in the furtherance of improving their working conditions, and, indeed, does not even seek collective bargaining contracts covering the working conditions of policemen, but rather seeks to obtain benefits for its members by the presentation of statistical and economic data and argument to municipal authorities, and by direct appeal for public support (R. 149, 160, 170).[1]

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[1] Union's Exhibit "A" (letter of instructions to local unions) (R. 149) states in part as follows:

> "Your certificate as Local 713 has been issued with the understanding that you will not use the strike weapon. I want to make plain also that if your local should engage in a strike your charter will be removed automatically, for we cannot condone a strike by police officers."

Mr. Zander, International President of the Union, testified, without contradiction, as follows in respect to International policy (R. 160):

> "Collective bargaining, as generally thought of, does not have application in public service. We do not advocate the use of the usual collective bargaining procedures in public service. Our collective bargaining, if it could be so described, is the use of the legislative process and the use of our right to petition our government. It is not the use of the collective bargaining contract for that kind of the usual collective bargaining procedure. We bargain with public officers with whom we deal about the matters which they can decide within the limits of their authority and discretion. When we reach an agreement, instead of entering into a collective bargaining agreement with them, they issue a statement of policy from the employer,

The facts leading up to petitioner's discharge are briefly as follows:

A few days prior to June 19, 1944, petitioner together with approximately thirty-three fellow policemen requested permission from the Chief of Police of the City of Jackson to use the City Court Room, a public building, for the purpose of organizing a labor organization to be affiliated with the American Federation of State, County and Municipal Employees (R. 135-136). Permission was refused and these policemen were advised that unless they renounced their respective intentions to join the American Federation of State, County and Municipal Employees, or any other labor organization, by 12:00 o'clock noon, Monday, June 19, 1944, they would be discharged (R. 137). Neither petitioner nor any of the thirty-three other policemen associated with petitioner in the organizing of the labor union, renounced the intention of becoming a member of the union, and they

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setting forth those conditions arrived at that way, and it is therefore necessary for me to say that we do not attempt to apply collective bargaining as ordinarily defined and thought of, in our work."

The oath of applicants for membership in the Union is as follows (R. 170):

"I" —— —— giving the name of the applicant — "pledge my honor to observe faithfully the constitution and laws of this local of the American Federation of State, County and Municipal Employees and the rules and regulations for the government thereof; not to make public any of the private proceedings of this local; to perform faithfully all the duties assigned to me; to support the products and services of organized labor by making purchases of such products and services; to so conduct myself at all times as not to bring reproach upon my local; and at all times to bear true and faithful allegiance to the American Federation of State, County and Municipal Employees and to the labor movement in general.

"I solemnly promise that I shall do all in my power to exalt and promote the cause of government service, aid in efforts to develop a more understanding public attitude toward public employment, and develop on the part of the general public a conviction of the value of public service." (Emphasis supplied.)

were thereupon discharged from their employment (R. 20). (On the next day, June 20, 1944, the City Council, by ordinance, ratified and approved in all respects the action of the Chief of Police in discharging petitioner and his associates (R. 22).)

As an employee of the Police Department of the City of Jackson since July 16, 1936 (R. 28), petitioner enjoyed certain seniority rights under the provisions of Chapter 55, Mississippi Laws of 1930, as amended, and, in addition, under Chapter 20 of the Revised Ordinances of the City of Jackson of 1938, petitioner was entitled to participate in a Disability and Relief Fund to which he had contributed one percent (1%) of his monthly salary during the period he was an employee of the Police Department. Upon being discharged from the Police Department, he lost these seniority and pension rights (R. 28).

Following his discharge, petitioner asked for and was granted an independent hearing before the City Civil Service Commission as was his right under the Civil Service Act of Mississippi, Chapter 28, Laws of 1944. He there raised all the Federal questions involved in the present petition. The Civil Service Commission affirmed the discharge of petitioner (R. 2-6), whereupon the petitioner took an appeal to the Circuit Court of Hinds County as was also his right under the provisions of the Civil Service Act of 1944, and again raised all Federal questions (R. 6-13).

The Circuit Court affirmed the decision of the Commission. Petitioner then took an appeal to the Supreme Court of Mississippi, which reversed the judgment of the Circuit Court of Hinds County on the grounds that petitioner was entitled to a jury trial on the limited issue of whether the Commission had acted in good faith and for cause, and the case was remanded for a new trial before a jury in the Circuit Court of Hinds County. (*J. R. McLeod* v. *City of Jackson*, 21 S. (2d) 916-918.)

In the second trial in the Circuit Court of Hinds County, petitioner again raised the same Federal constitutional questions (R. 23-26). The jury found in favor of the petitioner and judgment was entered accordingly (R. 234). The City of Jackson then took an appeal from this judgment of the Circuit Court of Hinds County to the Supreme Court of the State. Petitioner again raised all Federal questions.[2] On this appeal the Supreme Court of Mississippi reversed the Circuit Court of Hinds County and held that, as a matter of law, the petitioner's expression of an intent to become a member of a labor union and his refusal to renounce that intention was an act tending to injure the public service, constituted insubordination and was good cause for dismissal (R. 241). (Regardless of whether the discharge was accomplished by the Police Chief, the Mayor or City Counsellors, the City Council, or the City Civil Service Commission, the Court specifically held that the discharge was the act of the City. *J. R. McLeod* v. *City of Jackson*, 21 S. (2d) 916). This decision ignored the Federal questions which had been raised, briefed and argued before it. A dissenting opinion was rendered, predicated in part upon the proposition that the discharge of petitioner violated his guarantees of freedom of speech, of peaceable assembly and petition under the Constitution of the United States (R. 252-253). The Supreme Court of Mississippi entered a judgment on January 14, 1946, reinstating the decision of the Civil Service Commission.

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[2] Under Mississippi practice petitioner, as respondent in the proceedings below could raise this question only in his brief and argument before the Supreme Court of Mississippi. See petitioner's brief therein, pp. 78-80, copies of which have been filed in conjunction with this petition for writ of certiorari. The Federal question was argued before the Court and discussed in the dissenting opinion of that Court (R. 252-3).

STATEMENT AS TO JURISDICTION

This case is of that character of which the court has jurisdiction under the provisions of the Act of Congress of February 13, 1935, Section 237-b, 28 U. S. C. A., Sec. 344-B.

This case is one in which the validity of the action of the City of Jackson under the Constitution of the United States was drawn in question upon the grounds that the action of the City of Jackson in discharging petitioner from his position in its Police Department and depriving him of his position, his seniority rights and his rights in a Disability and Benefit Fund, to which he had long contributed, violated petitioner's rights of peaceable assembly, of free speech, and to petition for redress of grievances, and denied him due process and the equal protection of the laws, all as guaranteed to him under the First and Fourteenth Amendments to the Constitution of the United States.

The case was finally disposed of by the Supreme Court of the State of Mississippi holding in favor of the validity of the action of the City of Jackson. Judgment against petitioner was entered by the Supreme Court of Mississippi on January 14, 1946 and every possible remedy within the State has been exhausted.

Petitioner drew into question at every step in the proceedings below the question of his rights to peaceable assembly, free speech, to petition for the redress of grievances, and to due process and the equal protection of the laws under the Federal Constitution. The majority opinion of the State Supreme Court ignored the federal questions brought before it; however, a dissenting opinion passed upon the federal questions raised by petitioner.

On April 3, 1946, an order was issued by Mr. Justice Black extending the time within which to file this petition for certiorari through April 30, 1946 (R. 255).

QUESTIONS PRESENTED

1. Does the action of the City of Jackson, in discharging petitioner from his employment as a police officer for the sole reason that such petitioner had signified an intention to become a member of a particular labor organization especially adapted to serve police officers, deprive petitioner of the rights of assembly, speech and petition guaranteed under the Bill of Rights and protected against infringement by the State under the Fourteenth Amendment, that is, can a municipality require the surrender of fundamental rights secured under the First Amendment as a condition of employment as a police officer?

2. Is such action of the City of Jackson, depriving petitioner as it does not only of his employment but of established seniority and pension rights, so unreasonable, arbitrary or discriminatory as to deprive petitioner of property rights without due process of law and to deny him equal protection of the law in contravention of the provisions of the Fourteenth Amendment?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

Police officers employed by municipalities located throughout the forty-eight States have manifested an interest in joining, and many of them have joined, labor organizations, and in particular the Federation of State, County and Municipal Employees, as a means of achieving economic protection, security and advancement. The question of whether this class of municipal employee has the bare right to assemble with his fellow employees in a labor organization whose laws and procedures are especially adapted to serving the interests of police officers has been raised in numerous localities, and the contrariety of answers given to this question has given rise to much con-

fusion and to disturbances similar to the one involved in the present case. There is no decision by this Court on that precise issue. A determination by this Court will serve to settle an issue which has become exceedingly controversial and vexatious. Since the problem involves issues of federal constitutional law and there are asserted constitutional rights of the highest order, the matter is one which can be definitely determined only by this Court.

In the present case the City of Jackson, Mississippi, has attempted to require the surrender of fundamental rights as a condition of being continued in employment by such municipality. It is important to note that the proscription imposed by the City of Jackson and upheld by the Supreme Court of Mississippi goes to the bare right of a particular class of municipal employees, namely, police officers, to assemble together and associate with their fellow employees in a labor organization for purposes of mutual discussion and mutual aid; the proscription is an absolute one, having no regard for the character or nature of the particular organization with which petitioner desires to affiliate or for the nature or character of any particular acts that might or might not be committed by petitioner while a member of such organization.

As more fully discussed in the brief in support of this petition, this Court has indicated in many decisions that the free exercise of rights secured under the First Amendment as basic to our society is not to be prohibited or restrained by the State even for purposes of public convenience, and can only be subordinated if the exercise involves grave and immediate danger to public interests—a condition entirely lacking in the present case. *Thornhill* v. *Alabama*, 310 U. S. 88; *DeJonge* v. *Oregon*, 299 U. S. 353; *Thomas* v. *Collins*, 323 U. S. 516; *West Virginia* v. *Barnette*, 319 U. S. 624. That the right of employees to assemble into and join labor organizations is a concomitant of the right

of assembly, speech and petition has been established in decisions such as *Thomas* v. *Collins, supra; Hague* v. *C. I. O.*, 307 U. S. 496; *Herndon* v. *Lowry*, 301 U. S. 242; *DeJonge* v. *Oregon, supra.* That the State, even in its capacity as an employer, has not an untrammelled privilege to require the surrender of fundamental rights has been determined in such cases as *Allen* v. *Georgia*, 166 U. S. 138, at 140; *Snowden* v. *Hughes*, 321 U. S. 1; *People* v. *Crane*, 214 N. Y. 154, affirmed 239 U. S. 195. As these cases indicate, it is the right of free assemblage, speech and petition which is given explicit protection by the Federal Constitution and not the power of the government, State or Federal, to impose any condition whatsoever in respect to the conditions of employment of its employees.

In addition, constitutional rights of a less fundamental, although no less important status, are involved under this case. Petitioner has been deprived not only of his employment but of vested seniority rights and rights to benefit payments from a fund to which he has regularly contributed. Deprivation of those rights for a reason so palpably arbitrary and so obviously discriminatory as that advanced by the municipality in the present case deprive petitioner of property without due process of law under the rationale of such decisions as *Nebbia* v. *New York*, 291 U. S. 502; *Frost* v. *Corporation Commission*, 278 U. S. 515; *Borden's Farm Products* v. *Baldwin*, 283 U. S. 194.

The issues involved in this petition are of a substantial nature involving important constitutional questions under the First and Fourteenth Amendments. An adjudication of the issues in this case by this Court is necessary to set at rest many of the perplexing constitutional questions that have arisen because of widespread desires of police officers to associate together and assemble into labor organizations for purposes of mutual aid and protection

and efforts of various municipalities to frustrate those desires.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the Supreme Court of the State of Mississippi, commanding that Court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case Numbered 35989 and entitled *"The City of Jackson, Mississippi,* v. *J. R. McLeod,"* and that the judgment of the Supreme Court of Mississippi may be reviewed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and meet, and your petitioner will ever pray.

Respectfully submitted,

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OCTOBER TERM, 1945

No.

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vs.

THE CITY OF JACKSON, MISSISSIPPI, A MUNICIPAL CORPORATION

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Mississippi is reported in 24 Southern (2d) 319, Advance Sheets.

JURISDICTION

The statement concerning jurisdiction is set forth in the petition and is incorporated herein by reference.

STATEMENT OF THE CASE

The statement of the case appears in the petition and is incorporated herein by reference. There is no dispute con-

cerning the facts involved, and such facts as are relevant are set forth in such statement and in the arguments that follow.

SPECIFICATION OF ERRORS

The Supreme Court of Mississippi erred in the following respects:

(1) Refusing to hold that the action of the City of Jackson, Mississippi (regardless of whether such action was accomplished through the Mayor, the City Commissioners, the Civil Service Commission or by City Ordinance) in dismissing petitioner from his employment as a policeman for the sole reason that petitioner had signified an intention to become a member of a particular labor organization whose laws and procedures were specially adapted to serve the interests of policemen, operated to prohibit petitioner from exercising his rights of assembly, speech and petition contrary to the guarantees of the First Amendment and to the protections afforded petitioner in the exercise of such rights under the Fourteenth Amendment.

(2) In refusing to hold that said action of the City of Jackson, causing petitioner to lose not only his employment but vested seniority and pension rights, was so arbitrary and discriminatory as to deprive petitioner of property without due process of law and to deny him equal protection of the law contrary to the provisions of the Fourteenth Amendment.

ARGUMENT

I

The Action of the City of Jackson in Requiring Petitioner to Surrender His Right to Join the Particular Labor Organization Involved in This Case as a Condition of His Employment With the City as a Policeman, and in Dismissing Petitioner from Such Employment for the Sole Reason That He Expressed an Intention to Join With His Fellow Employees in Such an Organization, Is in Contravention of the First and Fourteenth Amendments to the United States Constitution as Depriving Petitioner of His Civil Rights of Assembly, Speech and Petition.

Petitioner, employed for many years by the City of Jackson, Mississippi, as a policeman and possessing a completely satisfactory service record, was discharged for the sole reason that he, together with thirty-three of his fellow policemen, had signified an intention of forming and joining a labor organization to be affiliated with the American Federation of State, County and Municipal Employees. The City took no account of the fact that that organization forbade striking by such of its members as were police officers and, indeed, in respect to such class of members did not even seek the customary collective bargaining agreements but instead relied upon the presentation of economic data and argument and appeal to the public to achieve protection and betterment of working conditions of its member policemen. Petitioner was not discharged for having engaged or having threatened to engage in any particular course of conduct while a member of such organization deemed by the City to be detrimental to its interests. Petitioner's discharge thus raises the important question of

whether any municipality can, consistent with the basic democratic rights secured under the First Amendment, require the surrender of the bare right to join a labor organization as a condition of employment as a policeman.

Before this question can be resolved, it is necessary to determine whether petitioner, in seeking to exercise the right of joining with his fellow police officers in a labor organization, was seeking to exercise a right secured under the First Amendment.

A. Right of Employees to Associate and Assemble Together in a Labor Organization for Purposes of Common Conference and Mutual Assistance Is a Concomitant of The Civil Rights of Assembly, Speech and Petition Sanctioned Under The First Amendment.

The right of people peacefully to assemble for political, social, economic or religious objectives and to petition for redress of grievances existed long before the adoption of the Constitution, is one of the inherent attributes of citizenship under a free government and is found wherever free government exists. *United States* v. *Cruikshank,* 92 U. S. 542, at 552; *State* v. *Butterworth,* 104 N. J. L. 549, 142 A. 57, 58 A. L. R. 744.

It was long ago determined by this Court that assemblage by any class of persons into political organizations for purposes of taking political action was a right protected as a concomitant of the right of assemblage. *Whitney* v. *California,* 274 U. S. 357. In *Herndon* v. *Lowry, supra,* the Court upheld the constitutional right to "address meetings and organize parties." *DeJonge* v. *Oregon, supra,* like the *Herndon* case, turned on the right under the First Amendment of individuals to form and organize groups and to solicit membership and to engage in the general dis-

semination of information through the medium of those organized groups.

That the right of assembly and petition does not exist only in regard to religious or political activities but extends to assembly for economic, scientific or informational ends as well was quite recently affirmed by this Court. In *Thomas* v. *Collins, supra,* this Court held specifically that the right of employees to assemble, speak and petition for economic ends in and through labor organizations is one protected by the First Amendment:

> "The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.
>
> "The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so."
>
> * * * * * * *
>
> "Lawful public assemblies, involving no element of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers. *And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.*" (Emphasis supplied.)

In *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 251, it was said by the Court in reference to Section 7 of the National Labor Relations Act:

> "Neither this provision, nor any other provision of the Act can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 33-34, we observed this right to be a fundamental one; that employees 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has to organize its business and select its own officers and agents; * * *"

See also *Hague* v. *C. I. O., supra; Thornhill* v. *Alabama, supra.*

The foregoing cases make clear that an employee, as an attribute of citizenship in this country, has at least the bare right to associate together with his fellow employees into a labor organization for purposes of common consultation and mutual aid and assistance. Is the fact that petitioner is employed as a policeman sufficient to require him to surrender that right under the circumstances of this case as a condition of his continued employment?

B. The State Can Restrict or Restrain The Exercise of Civil Rights, as Distinguished from Dealing with Abuses Arising Therefrom Only When Such Exercise Involves Grave and Immediate Danger to Public Interests—Circumstances Not Present in The Instant Case.

In the *Thomas* case, *supra,* this Court stated that "the indispensable, democratic freedoms secured by the First Amendment" occupy "a preferred place" in our scheme of government which "gives these liberties a sanctity and

a sanction not permitting dubious intrusions." This Court in that case further stated that:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice These nights rest on firmed foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

See also *West Virginia* v. *Barnett, supra.*

What are the circumstances of grave and impending public danger in the present case which might serve to justify the action of the city in dismissing petitioner because of his expressed intention to join a labor organization and to require as a condition of petitioner's employment that he refrain from assembling with his fellow employees into a labor organization? It must be remembered that "fear of serious injury cannot alone justify suppression of free speech and assembly * * * Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy unless the evil apprehended is relatively serious * * * Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was so substantial as to justify the stringent restriction inter-

posed by the legislature." Mr. Justice Brandeis, in *Whitney* v. *California, supra,* at 377.

The City of Jackson was not confronted with a strike or threat of strike by petitioner or any other policeman by reason of the membership or contemplated membership of such policeman in the American Federation of State, County & Municipal Employees. Indeed, had the city officials taken the trouble to investigate the organization in question they would have found, as the record herein discloses and as has been previously indicated, that such organization forbade the right to strike, does not engage in collective bargaining in the usual sense, and otherwise accommodated its proceedings to the enlistment of policemen into membership; the fact is that the policemen in question were willing voluntarily to relinquish their right to strike (R. —). Neither was the City confronted with any particular situation under which mere membership in a labor organization by city policemen created a condition of grave public danger. Petitioner was flatly prohibited from peacefully exercising his bare right of assembly merely because the City feared that sometime in the future under some undetermined circumstance the fact of membership might in itself create a condition of grave public peril. Even this fear of future danger was entirely speculative and completely without foundation in any facts within the knowledge of the City tending to indicate that, by reason of the nature of the organization or its practices as expressed in its laws, its literature or in its past history, membership therein would jeopardize public safety.

It is possible, of course, that abuses might arise from the fact that a policeman became a member of a labor organization. A strike of police officers might endanger public interests, but the City's interdiction was not directed against striking or even threats of striking. Acts of favoritism or preference by reason of such affiliation might also bring

about situations inconsistent with public safety. By the same token, however, membership in any organization—fraternal or religious—might bring about similar situations. But, again, the proscription did not run against acts of favoritism; the bare assemblage of policemen in a labor organization was prohibited. It is one thing to regulate and proscribe against abuses which might follow from peaceable assembly, from common consultation and discussion, or from an attempt to petition for redress of grievances. It is quite another to restrain, regulate or prohibit the exercise of these basic rights themselves. The distinction has most aptly been stated in the case of *DeJonge* v. *Oregon, supra.* In speaking of the rights secured under the First Amendment, this Court stated:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.
>
> "It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. *The question, if the rights of free speech*

> *and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose;* not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crime elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. *But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge."* (Emphasis supplied.)

By the same token and for exactly the same reasons it is respectfully submitted that the City of Jackson cannot seize upon mere participation by its policemen in a peaceable and lawful assembly as a basis for the imposition of drastic penalties in the complete absence of any particular abuses, either actual or threatened, arising from or incident to such assemblage. If the City feels that certain action might be engaged in by its policemen as a result of their affiliation, there is nothing to prevent the City from stating in advance that if and when any such actions are engaged in or threatened to be engaged in, then the policemen will be subject to suspension, discharge, or other penalty; the mere fact of joining an organization such as the American Federation of State, County and Municipal Employees cannot in and of itself be unconditionally proscribed.

C. The State or a Branch Thereof Does Not Possess Absolute Power to Condition Employment With It; Such Power Is Limited at Least by the Provisions of the First Amendment.

A principal argument advanced by the City of Jackson in support of its action in prohibiting its police employees

from assembling into a labor organization is that the City possesses an unlimited power to prescribe conditions in respect to the employment of its own employees. Although there are decisions sustaining the proposition that the State in its capacity as an employer has almost the same discretion to impose conditions as does a private employer (*Heim* v. *McCall*, 239 U. S. 175), no case supports the proposition that this power is unlimited and can be exercised without regard even to the Bill of Rights. Thus, the *Heim* case merely held that a State policy of employing only its own citizens to the exclusion of aliens is a reasonable one based upon reasonable distinctions. Neither that case nor any other case involving government employment holds that either the State or Federal government can provide that no government employee shall adhere to a particular religion, shall belong to a particular political party, or shall be a member of a particular race. Nor do decisions indicating that there is no property right in a public office support a conclusion that a government may condition public employment as it pleases. Mr. Justice Cardozo, while sitting as Chief Judge of the New York Court of Appeals and Errors, pointed out the distinction in the case of *People* v. *Crane*, 214 N. Y. 154, affirmed 239 U. S. 195. In upholding the right of the State of New York to prohibit the employment of aliens in the construction of public works, Justice Cardozo stated as follows:

> "In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the State. (*Smith* v. *Texas*, 233 U. S. 630, 638.) We do not hold it may discriminate among its citizens on the ground of faith or color. (*Strauder* v. *West Virginia*, 100 U. S. 303; *Gibson* v. *Mississippi*, 162 U. S. 565;

Rogers v. *Alabama*, 192 U. S. 226, 231.) A citizen may not be disqualified because of faith or color from service as a juror. (*Strauder* v. *West Virginia, supra.*) For like reasons we assume that he may not be disqualified because of faith or color from serving the state in public office or employment. It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared disqualified from service, unless the proscription bears some relation to the advancement of the public welfare. (*Strauder* v. *West Virginia, supra*, at p. 305.)"

Mr. Justice Bradley, in his dissenting opinion in the case of *Ex parte Curtis*, 106 U. S. 371, 376, further emphasized this point in a statement unquestioned by the majority opinion:

"The offices of the government do not belong to the Legislative Department to dispose of on any conditions it may choose to impose. The legislature creates most of the offices, it is true, and provides compensation for the discharge of their duties; but that is its duty to do, in order to establish a complete organization of the functions of government. When established, the offices are, or ought to be, open to all. They belong to the United States, and not to Congress; and every citizen having the proper qualifications has the right to accept office, and to be a candidate therefor. This is a fundamental right of which the legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights."

In *Wilson* v. *North Carolina*, 169 U. S. 586, at 593, it was contended that a state statute, and action of the Governor under it in suspending a railroad commissioner from office, deprived that officer of rights guaranteed by the Fourteenth Amendment. The highest state court had held that the stat-

ute was valid and the governor's action was proper. This court held that under these circumstances no Federal question was presented. The Court stated:

> "The procedure was in accordance with the constitution and laws of the State. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held * * * The fact would have to be most rare and exceptional which would give rise in a case of this nature to a federal question."

But this Court went on to quote with approval its language in *Allen* v. *Georgia,* 166 U. S. 138, at 140, that:

> "The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

And in *Hague* v. *C.I.O., supra,* this Court held that a municipality does not possess an absolute discretion to deny use of its streets for purposes of speech or assembly.

Petitioner does not, of course, contend for the right to exercise his liberties of assembly, speech and petition during working hours or in a manner such as to conflict with his official duties. He does contend that he cannot be required by the City of Jackson to surrender or bargain away his fundamental right to associate and assemble together with his fellow employees during his free hours for purposes of common consultation and mutual aid, and for purposes of petitioning for redress of his grievances, through an organization of his own choosing. These, it is respectfully submitted, are fundamental rights which no branch of government can cause to be surrendered even as a condition of employment by government. As stated by this Court in *Thomas* v. *Collins, supra:*

> "There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic

may exercise throughout its length and breadth, which no State, nor all together, nor the National itself, can prohibit, restrain or impede."

II

The Action of the City of Jackson in Requiring Petitioner to Surrender His Rights of Assembly, Speech and Petition by and Through a Labor Organization of His Choosing as a Condition of Employment, Thereby Depriving Petitioner Not Only of His Employment But of His Vested Seniority and Pension Rights, Is so Arbitrary and Discriminatory as to Deprive Petitioner of Property Without Due Process of Law and Deny Him Equal Protection of the Law.

The action of the City of Jackson, in requiring petitioner to lose his employment as a police officer because of his professed intention to join the American Federation of State, County & Municipal Employes, resulted not only in loss of employment but in loss of seniority rights secured under state statutes and in loss of participation in a benefit fund to which petitioner had regularly contributed for a number of years. Even if it be said that petitioner had no property right in his job as such, he surely had property right both in his seniority privileges (*Evans* v. *Louisville & N. R. R.*, 191 Ga. 395, 12 S. E. (2d) 611 (1940); *Bradford* v. *Kurn & Lonsdale*, 235 Mo. App. 1282, 146 S. W. (2d) 644 (1940); *Ledford* v. *Chicago, M., St. P. & Pac. R. R.*, 298 Ill. App. 298; *Griffin* v. *Chicago Union Station*, 13 Fed. Sup. 722; *Nord* v. *Griffin*, 86 Fed. (2d) 481; *Estes* v. *Union Terminal Co.*, 89 Fed. (2d) 768) and in the benefit fund to which he had contributed.

Such rights, vested as they are, cannot under the Fourteenth Amendment be taken from petitioner by the State

or a branch thereof without due process of law or in a manner so as to deny him equal protection of the law.

Since the case of *Nebbia* v. *New York, supra,* it has been established that the State can deprive of property rights where there exists a rational basis for such deprivation, but that rational basis requires a reasonable connection between the prohibition imposed and the objective sought. In the present case the sole reason for the action of the City of Jackson in depriving petitioner of his vested property rights was that petitioner had professed a desire to affiliate with a particular labor organization, an organization which in fact prohibits its policemen members from striking and which, instead of seeking to protect and better the conditions of employment of its members through the usual process of collective bargaining, seeks to accomplish such objective by means of presentation of economic data and argument and by direct appeal to the general public through the media of press, radio, handbill and speech. There was nothing in the mere fact of joining such organization, even if petitioner had actually joined, which would *per se* incapacitate petitioner in the performance of his police duties, and no activity was threatened which would interfere with such duties. There was no request or demand that the petitioner engage in any activities during his working hours or that he be permitted to perform any acts which would interfere with his duties as policeman. The bare fact of peaceful assemblage with his fellow employees was seized upon as a reason of depriving petitioner not only of his employment but of his seniority rights and his interest in the benefit fund. Surely, such action is arbitrary and unreasonable and without rational basis within the meaning of those terms as used in *Nebbia* v. *New York, supra,* and cases subsequently decided, and as such contravenes the due process clause of the Fourteenth Amendment.

In addition, the denial of the right of citizens of the State of Mississippi, who were or intended to become members of a labor organization such as the American Federation of State, County & Municipal Employees, to obtain or retain employment by the State as police officers, was highly discriminatory, and when such discriminatory action resulted in the deprivation of property rights as it has in the present case, it constitutes a denial of the equal protection of the laws contrary to the Fourteenth Amendment. Of all the citizens of Mississippi, only those who are members of the American Federation of State, County & Municipal Employees are denied opportunity to serve the State as policemen. The prohibition has no necessary connection with the capabilities of the members of the excluded class or of their ability adequately and faithfully to perform the duties of their office. The distinction between the class of citizens who desires to join labor organizations and the class who does not is an arbitrary one in so far as employment with the State is concerned. In being deprived of his employment, seniority and benefit rights for the sole reason that he did seek to become a member of an organization such as the American Federation of State, County & Municipal Employees, petitioner was clearly denied the equal protection of the laws under the principles of law set forth in cases such as *Smith* v. *Texas,* 233 U. S. 630; *Borden's Farm Products* v. *Baldwin, supra; Frost* v. *Corporation Commission, supra.*

CONCLUSION

It is respectfully submitted that under the decisions cited and discussed in the foregoing arguments petitioner has been denied and deprived of rights granted and secured under the Constitution of the United States, and that the

decision of the Mississippi Supreme Court refusing so to declare should be reversed; to that end this Court is respectfully requested to grant this writ of certiorari.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1170

J. R. McLEOD,

Petitioner,

vs.

CITY OF JACKSON

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 1170

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CITY OF JACKSON

RESPONSE TO PETITION FOR CERTIORARI

I

Record Not Complete

The record herein printed omits the following relevant proceedings in Mississippi's Supreme Court.

(a) Certain questions propounded upon appeal in No. 35,803.

(b) The opinion on prior appeal, No. 35,803.

(c) Assignment of Errors in (1) 35,803 and (2) in 35,989. All are appended under certificate, together with a certificate from Mr. Justice Griffith, who delivered the opinion in

Mississippi's Supreme Court, that no Federal question was considered or decided and that the decision was limited to questions of local law, whereunder the rights of the respective parties were properly admeasurable.

II

Reply to McLeod's Petition for Certiorari, Utilizing Same Headings

1. *Summary Statement of Matter Involved*

(a) Disregarding for the moment that said by McLeod, we thus state for the Court's convenience the City's viewpoint.

Jackson, though the capital of Mississippi, is comparatively a small City, possessing a population of fewer than 100,000. Its charter is found in the General Laws, Mississippi Code of 1930, Sections 2626 to 2656, wherein under Section 2639, it is provided:

> "The council shall also have power, from time to time, to create, fill or to discontinue any and all offices and employments other than those created herein * * * to remove any officer or employee elected or appointed by the council, and to elect or appoint a successor; * * *"

Compare *Glover* v. *Columbus,* 197 Miss. 467, 19 So. 2d 756, whereunder, with or without cause, a policeman might be removed.

Under Chapter 208, Laws of Mississippi of 1944, page 465, McLeod (with other policemen) was inducted under Civil Service and his tenure was under Section 9: "during good behavior", but with right of removal in the Mayor and Commissioners (called appointing authority) when "* * * incompetency, inefficiency, or inattention of duty; dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public, or a fellow em-

ployee, *or any other act of omission, or commission tending to injure the public service.*" No officer can hold in Mississippi during "good behavior", Section 20, Constitution of 1890.

Beginning in January, 1944, secretly, steps were taken looking towards the organization of a local police union under American Federation of State, County and Municipal Employees, an affiliate of the American Federation of Labor. Progress was continued secretly with a charter mailed in early June, 1944. On June 16th, there was in progress a municipal campaign wherein Scott, the then Mayor, sought re-election. Hawkins and Taylor, the Commissioners, were not candidates. According to petitioner's evidence (transcripts 208 and 209), Bruton, the spokesman for the proposed union, met the Mayor and this conversation occurred:

> "A. He (the Mayor) asked me (Bruton) when it (the Union) was formed, and how many men had joined it, and he patted me on the shoulder and told me it was all right, but we couldn't afford to let it get out at this time. He said, 'I got everything being lined up in good shape. If it gets out, it is going to tear it all down and defeat me.' He said 'It will be dirty politics'. I told him there was no politics involved in it.
>
> • • • • • • •
>
> "A. He said he wanted us to keep it under cover and not let it get out until after the election, and then he would help us organize it.
>
> "By Mr. Green: We object to that as a declaration by the Mayor, if made, that was in the capacity as a candidate, and in no way binding upon the City.
>
> "By the Court: Overrule the objection.
>
> "By Mr. Burkett:
>
> "Q. That he would help you organize it if you kept it quiet until after the election?
>
> "A. Yes, sir.

"Q. Did you tell him you would do that?

"A. No, sir; I told him that the men had already voted for a committee to call on the chief of police that afternoon as soon as court was over, and request permission for them to meet in the court room for about fifteen minutes to set up a permanent organization.

"Q. Then what did he say?

"A. He said he couldn't do it. He said he couldn't afford for it to come out, he was not going to lose out. He said he was going to fight this if it cost him the election. He said he considered it a slap in his face and a stab in his back."

The Chief of Police, Holden, reported (transcripts 14 and 92):

"On yesterday afternoon, Friday, June 16, 1944, at about 4:30 o'clock, the following group called on me in my office: O. V. Jordan, a representative of I. B. E. W. local union of the Mississippi Power & Light, Frank Thompson for the Brick Masons local union; L. E. Pollock from the Painters and Decorators Local Union; George Cook from the Motion Picture Operators local union; George Cooper of the I. B. E. W.; B. R. Upton from the Carpenters Local Union; W. G. Hemphill from the Bus Drivers local Union and B. H. Bowers of the Bus Drivers Union. In addition to these, the following were present: J. D. Lowery, J. R. McLeod, and C. I. Bruton, of the Jackson Police Department.

"This committee called on me for the purpose of announcing the formation of a local union for the Jackson Police Department, which is known as Local No. 713 of the American Federation of State, County and Municipal Employees; * * *."

Immediately upon this becoming known, a group of businessmen assembled at the Chamber of Commerce rooms and passed this Resolution (transcripts 18 and 114):

"Moved that the Chairman appoint a committee of five to call on the Mayor and Commissioners and in-

> form them that in the opinion of a representative group of business men the allegiance of police employees should not be divided and that the Mayor and Commissioners shall take immediate steps to maintain a police department which shall be wholly directed by elected city officials."

With the issue thus made, McLeod was removed and as shown by the record, his claim was that the removal was solely for political purposes (transcripts 180 and 181), the references to the Union issue being merely a smoke screen.

McLeod then appealed to the Civil Service Commission, where, at this hearing, much evidence was taken (transcripts 65 and 107), whereafter the Commission sustained the appointing power in the removal. Thereupon, McLeod assumed to appeal to the Circuit Court alleging in his petition therefor (transcript 6) that his right was solely in virtue of Section 10, Chapter 208, Laws of 1944, providing:

> "* * * such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion or suspension made by the commission, was or was not made in good faith for cause, and *no appeal to such court shall be taken except upon such ground or grounds.*"

Whereafter, a hearing was had in the Circuit Court thereunder, in which no jury was empaneled and at which the Circuit Court on motion of the city affirmed. Thereupon, McLeod appealed to the Mississippi Supreme Court, wherein the opinion was as shown in Appendix A, and reversal had for a jury trial. Upon remand, McLeod thoroughly misconceived the import of the reversal and induced the Circuit Judge, contrary to his initial opinion, to assume to try not that authorized by the Statute quoted *supra,* but solely that done by the Mayor and Commissioners.

Over the City's objection, McLeod excluded (a) all proceedings had by the Civil Service Commission; and (b) all evidence taken before that body; and after much evidence had, the cause submitted to the jury on an issue made substantially by McLeod's instruction, thus:

> "The Court instructs the jury for the defendant, J. R. McLeod, that under the law of the State of Mississippi, the defendant had an employment with the City of Jackson, which could not be terminated by said City, except in good faith and for cause, and unless the City of Jackson has established by a preponderance of the proof in this case, that the employment of the defendant was terminated in good faith and for cause, then you should find for the defendant."

Thereupon, the jury returned a verdict for McLeod and the basis thereof was alleged wrongful political action by Scott, who is claimed by McLeod to have been motivated by a desire for his political preferment rather than for the public benefit, whereupon motion *non obstante* was filed by the City, which, being overruled, judgment for McLeod was entered thus:

> "It is therefore ordered and adjudged that the defendant, J. R. McLeod, be, and he is hereby reinstated in, and restored to his position as a member of the Police Department of the City of Jackson, Mississippi, with all the immunities, rights, privileges and emoluments appurtenant thereto, as if all the orders, ordinances, resolutions of the City of Jackson, and the judgment of the Civil Service Commission of said City with respect to the dismissal and discharge of the defendant, had not been made, adopted and entered." (Transcripts 234 and 235.)

Thereupon, the City appealed and under errors assigned, involving no Constitutional question whatever, in the view taken by the Court, the Supreme Court reversed and dis-

missed. The opinion appears at Transcript 235, concurring opinion by Chief Justice Smith, a dissenting opinion by Mr. Justice McGehee, a statement by Mr. Justice Roberds.

From that thus done, certiorari is here sought. (b) Recurring now to McLeod's claim under this heading made, therefrom, with deference, we dissent because the causa causans of McLeod's dismissal was not "for *sole reason* that petitioner had expressed an intention of becoming a member of American Federation of State, County and Municipal Employees," petition page 2.

1. Walter A. Scott, then Mayor and candidate for re-election, on July 2, 1944, was confronted by the proposed unionization of Jackson's Police Force and when so placed on the spot politically, thus spoke as hereinbefore declared.

2. When appealing to the Circuit Court as permitted by Section 10, Laws of 1944, Appendix B, McLeod voluntarily stated judicially (transcript 9):

> "• • • the proof shows that the respondent was discharged because he refused to support actively the candidacy of Walter A. Scott for Mayor of the City of Jackson."

And similar declarations occur passim.

(c) As to the alleged anomaly of a Labor Union foregoing the right to strike, collective bargaining (*Thomas* v. *Collins*, 323 U. S. 516, 89 L. Ed. 340), and other fundamental rights sacred in the eyes of unionism.

These factors were not integrated affirmatively before the Mayor and Commissioners.

At petitioner's request, the Circuit Court deleted all proceedings on appeal before the Civil Service Commission.

The sole instruction asked by petitioner as to his rights was as above quoted.

The City was refused, specifically:

> "Instruction C. The Court instructs the jury as a matter of law over which the jury have no power to pass that the City of Jackson, when acting by its Mayor and Commissioners might lawfully prescribe and provide that no person being a member of this union affiliated with the American Federation of Labor could longer be a policeman."

And, likewise Instructions B through Q of similar import were refused, whereasto, if judicial notice may be taken, we refer to Appendix C, the opinion of the Police Commissioners of St. Louis, Missouri, quoting therefrom:

> "History and common sense teach us that this self denial may be very temporary and fugitive. Particularly is this true when we consider that the right to strike is of the very essence and strength of the union movement. It is a right for which the unions have fought and sought recognition from the public and the Courts. The great union organizations and their leaders have all taken the position that they will not permit any diminution of that right."

And this very Federation permitted at Philadelphia a strike involving fundamental health conditions against organized government (transcript 193).

(d) As to the claim of (1) seniority rights and (2) participation in the Disability and Relief Fund. Petitioner received all whereto he was thereunder entitled so that as at the date of discharge, he had therein no property rights whatsoever, but had he, the possession thereof did not entitled him to continue as policeman, but only to the restitution admeasured by his rights therein, which were in no way covered under the special statutory proceeding wherethrough this Court obtains jurisdiction. Furthermore, these rights, if existent, were not so shown in the

transcript as to merit consideration. The Circuit Judge excluded on the ground of irrelevancy (transcript 213). We admit McLeod claimed Constitutional rights, but did not do, with deference, that requisite to present them here in this aspect and consequently, make no further reference to alleged property deprivation, confining ourselves to the rights claimed, alleged to be more fundamental.

(e) Petitioner claims Federal questions raised, petition pages 4 and 5, before (1) Civil Service Commission, (2) Hinds County Circuit Court, (3) Supreme Court of Mississippi, First Appeal, #35,803, (4) Re-trial, Circuit Court of Hinds County, and (5) Second Appeal, Cause #35,989.

With deference, we deny herein any Federal questions properly raised or reviewable, even though as to certiorari, the jurisdiction is broad, in this that (1) such questions were "ignored", petition pages 5 and 6, and (2) only local questions determined.

III

Statement as to Jurisdiction and Questions Presented (Claimed by Petitioner to Be Presented)

Herein, McLeod claims (1) "That the sole reason for discharge was that the petitioner has signified an intention to become a member of a particular labor organization • • • (thus) depriving petitioner of the right of assemblage, speech and petition guaranteed under the Bill of Rights and protected against infringement by the State under the Fourteenth Amendment", and does such action "of the City of Jackson" deprive McLeod of rights under the Fourteenth Amendment?

Not only, with deference, are these statements inaccurate, but they fundamentally misconceive that judicially at issue and determined.

(a) Petitioner concedes, petition page 6, "majori opinion of the State Supreme Court ignored the Feder ques-tions brought before it". We affirm this was proper ecause there were by petitioner's own conduct presented solely local questions for decision, adequately admeasuri g McLeod's rights and precluding judicial relief under Mississippi Law. Wherein consider (1) by Section 2639, Code of 1930, Section 3803, Code of 1942, the City might have removed McLeod at pleasure, with or without cause. *Glover* v. *Columbus,* 197 Miss. 467, 19 So. (2d) 756; *Kendall* v. *City of Canton,* 53 Miss. 526; then by Chapter 208, Laws of 1944, McLeod being inducted into Civil Service, had those rights under Mississippi's Statute as determined by Mississippi's Court, holding substantially that the Civil Service Commmission might define administratively "cause" and having thus done, thereasto there was no judicial question.

McQuillan, Municipal Corporations, Vol. 2, Rev., 2nd Ed., 428, 437, 499, it is said:

> "* * * the exercise of the power of removal from office is administrative, as distinguished from judicial. * * *
>
> "Where power to remove for cause is conferred but the law does not define 'cause' it is left for the agency vested with the power of removal to determine what is sufficient cause. * * *".

Compare Dillon, Municipal Corporations, Vol. 1, 4th Ed., at page 692; *State ex Rel.* v. *City of Seattle,* 159 Wash. 392, 293 Pac. 459; *City of Elkhart* v. *Minser,* 211 Ind. 20, 5 N. E. (2d) 501. In *State* v. *Boyington,* 110 Wash. 622, 188 Pac. 777, 779, 780, the Court said:

> "It is not for the courts to say what cause is or is not sufficient to support a dismissal by the civil service commission unless possibly the cause assigned be so

> frivolous that all minds must necessarily agree that it is not a legitimate cause.
>
> "Stated generally we think it may safely be said, that, the subject of inquiry by the court touching such cases is not whether they have been decided rightly or wrongly by the special tribunal created by the law to decide them, but whether or not the city authorities, including the special tribunal, have proceeded in the manner prescribed by law, in this case the city charter."

However, so far as we have been able to ascertain, assuming the dismissal to have been solely for Union participation, the right to exclude existed on the part of the City. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 14 Law Week 2627. In *Doyle* v. *Kammeraad*, 17 N. W. (2d) 165, 310 Mich. 233, the Court said:

> "A police force is practically a military force, and something more than an ordinary executive branch of city government, and the members of the force must surrender individual powers and freedom of action in favor of undivided allegiance to their public duty."

As well might the judiciary see fit to revise the decision of a military tribunal, adjudging a "union" of soldiers to be contrary to military discipline and public welfare. Simply the judicial power does not extend thereto. However, note approval by Mississippi Court herein of *Fraternal Order of Police* v. *Lansing Board of Commissioners*, 306 Mich. 68, 10 N. W. (2d) 312:

> "Those who serve the public, either as makers of the law, interpreters of the law, or those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights. As stated by Mr. Justice Sharpe 'Nor can it be denied that when a person is appointed and becomes a member of the police department he subjects himself to the reasonable rules, regulations adopted by the board'.

"We agree with the trial judge that the resolution adopted by the Board was reasonable and that it cannot be said that such action is not within the scope of authority granted by the charter of the City of Lansing. Neither the plaintiff nor the individual concerned are deprived of any constitutional rights."

Mississippi Court also approves:

(a) *Hutchinson* v. *Magee,* 278 Pa. 119, 122 Atl. 234;
(b) *Carter* v. *Thompson,* 164 Va. 312, 180 S. E. 410;
(c) *McNatt* v. *Lawther,* Tex. Civ. App., 223 S. W. 503;
(d) *San Antonio, etc., Local Union* v. *Bell,* Tex. Civ. App., 223 S. W. 506;
(e) *Brownell* v. *Russell,* 76 Vt. 326, 57 A. 103;
(f) *McAuliffe* v. *City of New Bedford,* 155 Mass. 216, 29 N. E. 517.

We find no decision holding that a City may not administratively exclude from its police force those obligated by oath to do that which may be inconsistent with their undivided allegiance.

By Section 10, McLeod, under Civil Service, was removable. The Civil Service Commission having considered *McLeod's* case, ordered his removal, yet all proceedings thereasto before said Commission were deleted from the record on McLeod's motion. Whereupon the Supreme Court of Mississippi sustained as appropriate the removal when McLeod, ignoring wilfully the right appeal and the manner wherein it might be had, assumed to bring before Mississippi's Court that whereasto it had no jurisdiction and wherefor dismissal was vouchsafed.

2. Mississippi's Court construed Mississippi's Civil Service Act, held that the Civil Service Commission administratively properly removed McLeod, having thereasto under said Statute the requisite power therefor properly administratively exercised.

3. On the judicial review vouchsafed by Section 10 in the Circuit Court, the sole issue there allowed "was or was not made in good faith for cause and no appeal to such Court shall be taken except upon such ground or grounds." Appeals in Mississippi are purely statutory. *Keaton* v. *State*, — Miss. —, 19 So. (2d) 477. Herein, on appeal to the Circuit Court, McLeod, over the protest of the City, confined the judicial inquiry solely to whether or not he was properly removed by the Mayor and Commissioners, disregarding entirely that done before the Civil Service Commission (whose proceedings were stricken on McLeod's motion) and the sole issue submitted to the jury by McLeod was under his Instruction No. 2, quoted *supra*.

McLeod's counsel, erroneously conceiving as to what the first opinion decided, got the Circuit Judge to hold (transcript 46):

> "Gentlemen, this Court will hold that the issue to be tried is whether or not the City Commission, that is, the Mayor and the two Commissioners, acted in good faith and that what the Civil Service Commission did or did not do, has no place in the trial of this case whatever. * * *".

So, when McLeod voluntarily assumed to have tried that which Mississippi's Law did not allow to be tried, appropriate dismissal was that requisite for conscious transgression of the express provision of this Statute.

4. McLeod submitted to the jury the sole issue above set out (transcripts 46, 222, 223 and 224). He did not request a directed verdict at the conclusion of his cause (transcripts 140 and 222), but having convinced the Circuit Judge that the sole issue was rightfulness of discharge by the Mayor and Commissioners, *vel non*, McLeod succeeded in having the Circuit Court judicially deny to the City (1) a directed verdict, (transcript 217) and (2) the following instructions,

whereunder the City sought to have integrated into this cause the view that the City might discharge McLeod by reason of his connection with the Labor Union, but these instructions and each of them from B to Q were refused in their entirety and we quote the most outstanding of them:

Instruction "C"—quoted *supra.*

Instruction "G":

> "The Court instructs the jury for the City that if you believe from the evidence in this cause that the Civil Service Commission, composed of Messrs. Ricks, Wright and Pullen, acted in good faith and for cause in entering its judgment against the defendant, McLeod, then it is your duty to bring in a verdict for the plaintiff even though you believe in your own mind that joining a police union would not injure the public service to be rendered by a policeman."

Instruction "H":

> "The Court instructs the jury for the City that if you believe from the evidence in this cause that the Civil Service Commission, consisting of Messrs. Ricks, Wright and Pullen, had before it evidence upon which it could find that the act of joining a police union was an act tending to injure the public service and if you believe that this commission did so find and in so doing acted in good faith, then it is your duty to find for the plaintiff even though you personally do not believe the same thing and would not have acted the same way."

Instruction "I":

> "The Court instructs the jury for the City that under the law it is the duty of the Civil Service Commission to determine whether the joining of a union by a policeman is an act tending to injure the public service and that if you believe from the evidence in this cause that the Civil Service Commission in finding that such act was an act tending to injure the public service acted in

good faith under the evidence submitted to them, then it is your duty to find for the plaintiff even though your personal belief may be to the contrary."

Instruction "M":

"The Court instructs the jury for the City that if you believe from the evidence in this cause that the City Commission had before it evidence upon which it could find that the act of joining a police union was an act tending to injure the *piblice* service and if you believe that this commission did so find and in so doing acted in good faith, then it is your duty to find for the plaintiff even though you personally do not believe the same thing and would not have acted the same way."

So herein, McLeod excluded affirmatively from the jury's consideration that which he now seeks to have here presented and excluded the City's instructions, declaring the right.

5. Furthermore, as to whether the conduct wherethrough these policemen were discharged was done by Scott individually and for personal motives or on behalf of the City was likewise an issue. Compare Instruction No. 3 (transcript 214).

6. As to the exact status of McLeod, whether member of a union or not, is quite uncertain and before both the State Circuit Court and the Mississippi Supreme Court, as stated in brief filed with this petitioner, McLeod conceded

That if McLeod had not been under Civil Service and had applied to be employed as a policeman, the City might have exacted as a condition of employment that he forego union participation.

7. Under Mississippi's Constitution, Sections 1 and 2, creating separate judicial department, that done by the Mayor and Commissioners and the Civil Service Commis-

sion was not subject to judicial review, being an administrative act.

8. McLeod voluntarily deleted from the record all proceedings before the Civil Service Commission, which alone had a right under Mississippi Statutes to review and having taken from the record voluntarily (but under a misconception) that whereasto the review might be had, may not raise a Federal question.

9. McLeod does not bring before this Court the whole case. Thus the issue made and on which McLeod succeeded before the jury was that his removal by Scott was political. That done by the Civil Service Commission constituted the last act of the City and the sole act reviewable by the Circuit Court under Section 10. *City of Jackson* v. *McLeod*, — Miss. —, 24 So. (2d) 319.

10. But if we be in error as to these grounds being exclusively local, then at best they were both local and Federal, (Transcript 6) and those local were the ones whereasto the verdict, with deference, was in McLeod's favor, but if there be Federal questions which, with deference, there are not, then as shown in the argument, those questions were judicially decided properly.

(b) Obviously, McLeod was not denied any right under the first Amendment, because freedom to assemble and speak does not connote the right thereby to compel the party having the municipal authority to involuntarily adopt that demanded. In short, the majority of the people having elected the local officials, had the right to have those officials exercise their discretion for the general welfare. The record wholly fails to show at any time or place that McLeod and his associates did not have the fullest right to assemble when and where they pleased and to say what they pleased.

No denial thereof is hinted at in this record. That solely complained about is that the Mayor and Commissioners did not do that which McLeod demanded. The reason for McLeod's discharge was his failure to cooperate with the so-called Scott machine.

(c) We affirm, if the Federal questions were in this record—and they are not—sought to be raised by petitioner, then they were properly decided, arising, we aver, judicially for the first time in this Court and not having been at any time passed upon by Mississippi's Supreme Court, though it is true that Mr. Justice McGehee may have adverted to them in his dissenting opinion. It is to be noted that there is a fundamental difference between reversing a judgment and affirming a judgment. When the judgment is reversed, the Court passes on only those issues adverted to. C. J. S. 1498, Section 1963.

(d) In fact, we deny that there are any Federal questions appropriately raised by the record in this cause.

(e) We do not acquiesce in petitioner's statement as to Mississippi Supreme Court practice. The City assigned certain errors, those errors being briefed, limited the Court's right to review under Section 146 of the Constitution. Constitutional questions are not decided by Mississippi's Court unless essential and no such condition existed. True, McLeod did refer to certain alleged Federal rights, but he could not catechize the Court into a decision as shown by the opinion of the Chief Justice, and certificate from Justice Griffith, who delivered the majority opinion. This practice as to certificate may presently be obsolete, but in years that were past, such certificates under certain circumstances had effect here, and in this case, we bring the certificate to definitely show that the Court did not intend to, nor did it decide any Federal question.

IV

Reasons Relied On for Allowance of Writ

With deference, no reasons exist why this Writ should be allowed, especially as the Supreme Court of Mississippi has not passed on this question directly or indirectly or defined what Jackson might or might not do and until it so does, this Court will not entertain for construction fundamental Constitutional rights. *American Federation of Labor* v. *Watson,* — U. S. —, 90 L. Ed. 715.

We, with deference, categorically deny the City of Jackson, as shown in this record, "has attempted to require the surrender of fundamental rights as a condition of being continued in employment by such a municipality." (Transcripts 46, 222, 223 and 224). But on the contrary, the sole issue under the instruction to the Circuit Court was as to that done by Scott, the Mayor, and the Commissioners, which was as to that allowed by Mississippi's Law on appeal, wholly irrelevant and immaterial and having so been, therefor the appeal was dismissed.

The Constitutional questions were not made the basis of the trial in the Circuit Court and that trial was that whereasto that Court had no jurisdiction and having none, the Supreme Court had none and this Court can have none (*Welch* v. *Bryant,* 157 Miss. 559, 128 So. 734), its jurisdiction being conditioned upon that of the Circuit Court and the local Supreme Court. All cases cited in this Section are distinguished under the argument. There was, however, no attempt to deny the right of "free assemblage, speech and petition" and, as above stated, there were no property rights, petitioner affirmatively having shown none to exist.

Therefore, there having been no decision of Federal rights herein, there having been no definition of the inter-

play between Federal and State rights, and that solely decided having been an immaterial issue improperly raised in the Circuit Court without lawful authority by McLeod, this Court should not, with deference, go a-fishing in a record wherein it will not find judicially determined that whereover it may exercise its supervisory power.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1170

J. R. McLEOD,

Petitioner,

v.

THE CITY OF JACKSON, MISSISSIPPI, A MUNICIPAL CORPORATION

REPLY TO BRIEF IN SUPPORT OF PETITION

City replies, using McLeod's captions for convenience.

Jurisdiction

As hereinbefore stated there is no jurisdiction here for the reasons above indicated. While jurisdiction as to certiorari is broad, Act of Congress of February 13, 1935, Section 237-b, of the Judicial Code 28 U. S. C. A., Sec. 344-B, that done by the State Supreme Court must be either to sustain or deny the Federal right (here it was ignored, properly). Until it shall have been considered, jurisdiction here should not be exercised. *American Federation of Labor* v. *Watson,* — U. S. —, 90 L. Ed. 715.

Statement of the Case

Reference therefor is made to the reply to the petition and integrated hereat.

Argument

I

Petitioner contends:

> "The Action of the City of Jackson in Requiring Petitioner to Surrender His Right to Join the Particular Labor Organization Involved in This Case as a Condition of His Employment With the City as a Policeman, and in Dismissing Petitioner from Such Employment for the Sole Reason That He Expressed an Intention to Join With His Fellow Employees in Such an Organization, Is in Contravention of the First and Fourteenth Amendments to the United States Constitution as Depriving Petitioner of his Civil Rights of Assembly, Speech and Petition."

Whereto city's replies are:

(1) No such question in this record, but if it there be, then

(2) Mississippi's court has made no line of demarcation between that permitted by Mississippi's law and that demanded by the Federal Constitution. Such determination is a condition precedent to judicial review here, *American Federation of Labor* v. *Watson,* — U. S. —, 90 L. Ed. 715; but if, notwithstanding, the Court takes jurisdiction, then

(3) Mississippi's Supreme Court decision (assuming it to have considered that which, with deference, it did not and to have decided that which, with deference, it did not) is correct in this

(a) McLeod's tenure was determinable upon cause, whereasto the Civil Service Commission of Jackson was

the ultimate authority and having terminated that tenure for cause by it deemed adequate, judicial review thereasto improper. The State's determination of the municipality's power is here conclusive. *Railroad Commission* v. *Los Angeles,* 280 U. S. 145, 74 L. Ed. 234; McQuillan, *Municipal Corporations,* Vol. 2, Rev., 2nd Ed., 428, 437, 499; and other authorities cited *supra.*

(b) But if this Court should judicially seek to review that thus administratively properly determined, then Mississippi's determination of cause accords with the unanimous rulings elsewhere, namely: an employer may refuse employment at pleasure to one who insists upon being a member of a union. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 62 L. Ed. 260; Teller, *Labor Disputes and Collective Bargaining,* 1943 Supplement, p. 77, collecting cases; *People ex rel. Furnsman* v. *Chicago,* 278 Ill. 318, 116 N. E. 158, L. R. A. 1917E 1069.

But if this be regarded as a Federal question for decision, we answer the action of the City of Jackson was appropriate and proper for the reasons hereinafter indicated. We challenge the accuracy of introductory remarks insofar as the same are inconsistent with that hereinbefore said.

Petitioner contends:

> "A. Right of Employees to Associate and Assemble Together in a Labor Organization for Purposes of Common Conference and Mutual Assistance Is a Concomitant of the Civil Rights of Assembly, Speech and Petition Sanctioned Under The First Amendment."

Whereto city's reply is:

(1) We are not concerned with the National Labor Relations Act, (July 5, 1935), 49 Stat. 449, c. 372, 29 U. S. C. A. Sec. 151, the Norris-La Guardia Act, (March 23, 1932),

47 Stat. 70, c. 90, 29 U. S. C. A. Sec. 101, nor the Wagner Act, (July 5, 1935), 49 Stat. 449, c. 117, 29 U. S. C. A. Sec. 151, for that whereasto our controversy is: the right of a city not engaged in commerce to do that requisite in the opinion of the constituted authorities to vouchsafe full police protection to the people. Just as the employee may constitutionally do, the employer may likewise constitutionally do and when so doing the law vouchsafed the corelative rights to each.

Compare *Hitchman Coal & Coke Company* v. *Mitchell,* 245 U. S. 229, 62 L. Ed. 260, 276:

> "This court repeatedly has held that the employer is as free to make nonmembership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power."

Approving *Adair* v. *United States,* 208 U. S. 161, 174, 52 L. Ed. 436; *Coppage* v. *Kansas,* 236 U. S. 1, 14, 59 L. Ed. 441.

Compare Teller, *Labor Disputes and Collective Bargaining,* 1943 Supplement, p. 77; Bulletin of International Association of Chiefs of Police, entitled "Police Unions and Other Police Organizations", Bulletin No. 4, dated September 1944; 31 Am. Jur., Sec. 11, p. 838; 26 A. L. R. 158; *Eagle Glass & Manufacturing Company* v. *Rowe,* 245 U. S. 275, 62 L. Ed. 286; *Platt* v. *Philadelphia R. R. Co.,* 65 Fed. 660; *Tosh* v. *West Kentucky Coal Co.,* 252 Fed. 44, 15 A. L. R. 376; *People* v. *Marcus,* 185 N. Y. 257, 77 N. E. 1073; *Nashville Ry. Light Co.* v. *Lawson,* 144 Tenn. 78, 229 S. W. 741; *Callan* v. *Exposition Mills,* 149 Ga. 119, 99 S. E. 300; *Moore Drop Forging Co.* v. *McCarthy,* 243 Mass. 554, 137 N. E. 919; *Courrier & Son* v. *In'l Moulders Union,* 93 N. J. Eq. 61, 115 Atl. 66; *People ex rel. Furnsman* v. *Chicago,* 278 Ill.

318, 116 N. E. 158, L. R. A. 1917E 1069 (1919); *Dantzler Lumber Co.* v. *State*, 97 Miss. 355, 53 So. 1; *Rawlings* v. *City of Newport*, 275 Ky. 183, 121 S. W. 2d 10; *Hopkins* v. *Ames*, 344 Ill. 527, 176 N. E. 729.

Hence when McLeod insisted that, as a municipal policeman, he would be obligated to: "* * * support the products and services of organized labor by making purchases of such products and services; * * *", he became obligated unconditionally to the union viewpoint and as against that viewpoint all others were scabs. That at issue, as shown by Judge Griffith, is not the merits or demerits of labor unions, but solely, may a sovereign state in the discharge of its police power—as to its policemen—exercise that discretion requisite to the conservation of its welfare and design for the preservation of it as an indestructible state as a part of an indestructible union? Compare the Tenth Amendment, Federal Constitution. See also Section 6-190, Mississippi Constitution, 1890, prohibiting impairment police power.

(2) The city neither directly nor indirectly now or heretofore has challenged the right of McLeod and his associates to assemble, to free speech and to petition. Therewith they were not content but in virtue of the right thus to assemble, speak freely and petition, they demand not a concomitant right but a paramount obligation upon the city to forego that deemed by the petitioner to be for his own best interest, quite irrespective of what the constituted authorities think public welfare demands. *Wilson* v. *North Carolina*, 169 U. S. 586, 42 L. Ed. 866; *Heim* v. *McCall*, 239 U. S. 175, 60 L. Ed. 206, approved in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 84 L. Ed. 1108.

McLeod and his associates, pursuant to their right, caused Scott's defeat. Having thus done they now demand that

in virtue of their will the constituted authorities do that which the constituted authorities think is improper.

We do not challenge ought contained in *United States* v. *Cruikshank,* 92 U. S. 542, 23 L. Ed. 588; *State* v. *Butterworth,* 104 N. J. L. 549, 142 A. 57, 58 A. L. R. 744.

Whitney v. *California,* 274 U. S. 357, 71 L. Ed. 1095. Therein, Mrs. Whitney was indicted for violation of California's syndicalism act, convicted, appealed, alleging constitutional right of free speech as to that whereon the conviction was, the crime consisting in substantially that said, and the Court reversed.

Herndon v. *Lowry,* 301 U. S. 242, 81 L. Ed. 1066, involved conviction under a Georgia statute assuming to punish for "attempting to incite insurrection". Defendant claimed the right to speak thereasto. For so doing he was convicted and the conviction was then vacated for a violation of the Fourteenth Amendment. Herein, as above said, petitioner spoke as he pleased, assembled when and as he pleased, and the sole thing by the City of Jackson done was that its Commission determined that a policeman could not be a member of a local union affiliated with the American Federation of Labor. No challenge was made here or at any time of petitioner's right to join any such union, the only thing done was when and if he so did voluntarily. Having thus done, by reason thereof, when commanded not so to do by the city for the public welfare, he was insubordinate, and it was requisite that, having placed his union membership above that deemed essential for the public welfare, the public welfare should be protected and the petitioner left free as a member of the union to seek whatever employment he chose, or, if he could, through his vote, to change the rule in the city government.

DeJonge v. *Oregon,* 299 U. S. 353, 81 L. Ed. 278, did not directly or indirectly involve employer-employee relation-

ship, but in truth that which was clearly within the protection of the Amendment.

Thomas v. *Collins,* 323 U. S. 516, 89 L. Ed. 430, involved punishment for contempt for violation of an injunction issued pursuant to a Texas statute wherein the majority (with deference, without support of the record) held the state could not punish Thomas for jointly

(a) Making a labor speech and generally soliciting adherence to a union; and

(b) Specifically soliciting Pat O'Sullivan to become a member of a local union without acquiring an identification card, where Thomas was a paid labor organizer.

The conviction was reversed because of the inclusion in the punishment of the speech made. The four dissenting Justices, Roberts, Frankfurter, Reed and Chief Justice Stone, held specifically state police power adequate to make regulations. Thereasto the majority did not dissent except when and as only such regulations directly affected the right of free speech and peaceable assembly.

In that case Thomas addressed a meeting and after making a set speech, specifically solicited, contrary to state statute, O'Sullivan, and therefor, with deference, was punished. As far as it goes and so far as it is cognate, it is a decision for the city, the first syllabus accurately saying:

> "An order which in general terms adjudges one guilty of contempt in violating an order restraining him from soliciting union memberships without first obtaining an organizer's card as required by a state statute, will be assumed to have followed the prayer of the motion and the fiat in contempt, which had been issued on the basis of both a general invitation to join a union and the specific solicitation of a particular individual; and, accordingly, on an appeal attacking the

validity of the order under the Federal Constitution, it must either be affirmed as to both invitations or as to neither."

In the opinion, it is said: "That the *state has power to regulate labor unions with a view to protecting the public interest is, as the Texas Court said, hardly to be doubted.*" 141 Tex. 591, 174 S. W. 2d 958. (Italics ours).

Thomas testified "his only object in coming to Houston was to *address this meeting.*" Thereasto the prevailing opinion pointed out:

> "It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable."
>
> • • • • • • •
>
> "These comparisons are at once too simple, too general, and too inaccurate to be determinative. Where the line shall be placed in a *particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence.*" (Italics ours).

Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U. S. 261, 84 L. Ed. 738, expressly recognizes that wherefor we contend:

> "• • • that employees 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has to organize its business and *select its own officers and agents.*" (Italics ours).

Fundamental liberty requires freedom—not constraint—and the city herein selected for those charged with this delicate duty persons who were non-partisan, just as in the trial of this case when the jurors were being selected, interest either way disqualified, and with an oath rendering partiality requisite, fairness was threatened, if not precluded.

Thornhill v. *Alabama*, 310 U. S. 88, 84 L. Ed. 1093. This case condemned an Alabama statute thus characterized (Syl. 7):

> A statute making it an offense to go near to or loiter about, without a just cause or legal excuse therefor, the premises of anyone engaged in a lawful business, for the purpose or with the intent of influencing or inducing other persons not to have business dealings with or be employed by such person, or to picket the works or place of business of another for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise which, as authoritatively construed and applied, leaves no room for exceptions based either on the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute, and which therefore prohibits any means used in the vicinity of a labor dispute to publicize the facts of the dispute, violates the constitutional guaranties of freedom of speech and of the press."

Hague v. *C. I. O.*, 307 U. S. 496, 83 L. Ed. 1423. Therein, the 7th and 9th syllabi are:

> "A municipal ordinance requiring the obtaining of a permit for a public assembly in or upon the public streets, highways, public parks, or public buildings of the city and authorizing the director of public safety, for the purpose of preventing riots, disturbances, or

disorderly assemblage, to refuse to issue a permit when after investigation of all the facts and circumstances pertinent to the application he believes it to be proper to refuse to issue a permit, is not a valid exercise of the police power."

"A decree in a suit to enjoin the enforcement, as against complainants, of a municipal ordinance under which they have been denied the right to hold lawful meetings, is not so vague in its terms as to be impracticable of enforcement or obedience, where it prohibits the defendants from excluding or removing from the city the complainants or persons acting with them, from exercising personal restraint over them without warrant, from confining them without lawful arrest and production of them for prompt judicial hearing, from interfering with their free access to the streets, parks, or public places of the city, and from interfering with their right, and the right of their agents and of those acting with them, to communicate their views as individuals to others on the streets in an orderly and peaceable manner, reserving to the defendants full liberty to enforce law and order by lawful search and seizure or by arrest and production before a judicial officer."

No one sought to compel McLeod not to do that by him as a citizen deemed appropriate but as a public police employee, his viewpoints were of most material interest to his employer and to have a bias in favor of one class of his employer as against another class of his employer, was such a condition as rendered it appropriate for the city to exclude any person with such a biased viewpoint. If McLeod wanted to be a policeman he had to be a policeman all the way through and with no other obligation wherethrough his performance of duty might be thwarted or embarrassed.

McLeod contends:

"B. The State Can Restrict or Restrain the Exercise of Civil Rights, as Distinguished from Dealing

with Abuses Arising Therefrom Only When Such Exercise Involves Grave and Immediate Danger to Public Interests—Circumstances Not Present in the Instant Case."

Therewith, under the unanimous holdings of all courts wherein this question has, up to now, been presented, McLeod's view has been denied and, with deference, properly so.

Reference is made to that part of the *Thomas* v. *Collins*, 323 U. S. 516, 89 L. ed. 340, opinion declaring:

> "Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

But herein no restraint on assembly, speech or petition has been placed other than the majority, with a right to determine, have found that the local officers should be in a position where the public peace is paramount and should not be imperilled by possible divided allegiance. These officers were obligated to anticipate and look to the future. In the *Collins* case penalty was sought to be imposed for that precedently done but under the police power, just as in medicine, an ounce of prevention may be worth a pound of cure. Under present strike conditions, the military arm must represent organized government and not a segment sometimes seeking to overthrow the same.

West Virginia v. *Barnett*, 319 U. S. 624, 87 L. ed. 1628, —salute the flag question—does not touch the power of the state to protect by anticipation as against conditions reasonably to be anticipated in the employment of police officers. The city certainly, for the public welfare, could not possibly have a less right than is confessedly possessed by a private employer. It must not be overlooked that

McLeod conceded (if he had not been a member and were applying for a position) that the city could exclude him by reason of his union affiliations. If initial exclusion, as admitted, constitutes adequate ground, then the same ground would be operative to terminate existing relationship and, with deference, there can be no valid distinction drawn. *Communis error facit jus.* The portion quoted as to serious injury has to do with punishment for utterances imposed after the utterances are had and in no wise has to do with the controlling by the national government of the policy of the State in its police power.

The City of Jackson, like every other city, has, under present conditions, strikes in store for it, whether we like it or not ,and to protect the public it had to have an "army" competent to deal with those who were seeking to subvert the public peace and if that army thus sought to be solely loyal at the same time was under oath to promote that deemed by the "enemy"—the unions—as essential, no one would contend that the army could or would be effectual. That type of question is not judicial and thereasto, with deference, the court must not deal. The judgment of the military commission, substantially such, is that which should be allowed to admeasure safety. Compare *Matter of Yamashita,* — U. S. —, 90 L. ed. 343.

Just as pointed out in the *St. Louis* case, the public is not to be left to self-denial on the part of its employees, and birds of a feather frequently, if not always, flock together. It has a right to absolute loyalty without qualification or condition and the fact that employees might forego voluntarily does not guarantee the public safety for the public has a right to compel that which is requisite for its protection and this national has two types, so-called, of unions: one, wherein it does not strike as against constituted authority; and the other where it does, as was the

case in Philadelphia, strongly suggesting that when and if it becomes potent enough it will have but a uniform rule. The right to strike is paramount. The court here could have found, if this were a judicial question, that, quoad, this situation, this union was but a wolf in sheep's clothing and with the public safety in the balance, no question of disloyalty should be tolerated.

The inter-relation between this particular union and its parent union was in writing and consciously was not produced on this hearing, the presumption therefrom is adverse under Mississippi's jurisprudence. West, *Mississippi Digest,* "Evidence," Key No. 77.

No authorities are cited and, with deference, none can be which takes away from the city its right to safeguard its peace by requiring that there be no division of loyalty between the State and those adversely interested and the labor unions presently are in many instances "adversely interested," to say the least of it, for but what, with deference, is an unlawful act? They have brought and are bringing this Nation to the brink of disaster, causing, and likely to cause, far greater danger than was ever caused by the trusts and just as the law curbed the trusts so must it curb those who would destroy the peoples' safety for their own private profit irrespective of how the public is made to suffer thereby. *Salus populi suprema lex.* Broom's Legal Maxims.

McLeod contends:

> "C. The State or a Branch Thereof Does Not Possess Absolute Power to Condition Employment with It; Such Power Is Limited at Least by the Provisions of the First Amendment."

Whereto city's reply is:

(1) Answered *supra* in part.

(2) The State in no way subordinate to the United States.

Fundamentally, the State of Mississippi and the United States co-exist, each within its respective sphere, exercising that portion of sovereignty to it allocated under the Constitution. Both governments are dependent for the accomplishment of their governmental purposes upon officers and employees and each is as to its officers and employees independent of the other, and not to be as to them in any way burdened. Initially, it was so held, beginning with *Dobbins* v. *Erie County,* 16 Pet. 435, 10 L. ed. 1022, *Collector* v. *Day* (*Buffington* v. *Day*), 11 Wall. 113, 20 L. ed. 122; *Graves* v. *New York,* 306 U. S. 480, 83 L. ed. 933.

We are conscious that subsequently it was held that an income tax non-discriminatorily levied by one sovereignty could be collected from the employees of the other sovereignty as the economic burden rested upon the employee and not upon the sovereign employing. Compare *Helvering* v. *Gerhardt,* 304 U. S. 405, 82 L. ed. 1427; *Graves* v. *New York,* 306 U. S. 481, 83 L. ed. 927; *M'Culloch* v. *Maryland,* 4 Wheat. (U. S.) 316, 376, 4 L. ed. 579, 594; *United States* v. *County of Allegheny,* 88 L. ed. 1209, 322 U. S. 174. However, as to who shall be officers of the United States and who shall be officers of the State, the other government has no right at all thereasto to interfere, each being quoad its essential officers, an independent sovereignty.

Compare the great case of *South Carolina* v. *United States,* 199 U. S. 437, 50 L. ed. 261, wherein it was said:

> "In other words, the two governments—national and state—are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers."
>
> • • • • • • •
>
> "In *Texas* v. *White,* 7 Wall. 700, 725, 19 L. ed. 227, 237, Mr. Chief Justice Chase, speaking for the court, declared:

"'Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.'"

* * * * * * *

"If it be said that the states can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the national government, we may turn to the opinion of Mr. Chief Justice Marshall in *M'Culloch* v. *Maryland,* 4 Wheat. 431, 4 L. ed. 607, for a complete answer:

"'But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.'"

And thus was sustained the right of the United States to tax liquor even though handled by South Carolina. Even as to this, there was a dissent by Justices White, Peckham and McKenna, wherein it was said:

"The delicacy of the question, the suggestion that, apart from constitutional limitations, the ruling made is, from an economic point of view, a just one, and the

> long and painstaking consideration which the court has given the case, cause me to be reluctant to announce a dissent. This, however, is overborne by the conviction that it is my duty to dissent and state my reasons. And this because the decision now made, as it is by me understood, overrules many cases, departs from a principle which has been recognized from the beginning, and, under the assumed necessity of protecting the taxing power of the government of the United States, establishes a doctrine which, in its potentiality, strips the states of their lawful authority."

And much force, with deference, may thereto be accorded.

Compare *Helvering* v. *Powers,* 293 U. S. 214, 227, 79 L. Ed. 291; *United States* v. *State of California,* 297 U. S. 175, 80 L. Ed. 567.

Compare *Helvering* v. *Therrell,* 303 U. S. 222, 82 L. Ed. 762, where it is said:

> "What limitations does the Federal Constitution impose upon the United States in respect of taxing instrumentalities and agencies employed by a State and, conversely, how far does it inhibit the States from taxing instrumentalities and agencies utilized by the United States, are questions often considered here. (Citing cases).
>
> "The Constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserved powers; both operate within the same territorial limits; consequently the Constitution itself, either by word or necessary inference, makes adequate provision for preventing conflict between them.
>
> "Among the inferences which derive necessarily from the Constitution are these: No State may tax appropriate means which the United States may employ for exercising their delegated powers; the United States may not tax instrumentalities which a State may employ in the discharge of her essential

governmental duties—that is those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution.

"By definition precisely to delimit 'delegated powers' or 'essential governmental duties' is not possible. Controversies involving these terms must be decided as they arise, upon consideration of all the relevant circumstances. Notwithstanding discordant views which have sometimes arisen because of varying emphasis given to one or another of such circumstances, it is now settled doctrine that the inferred exemption from federal taxation does not extend to every instrumentality which a State may see fit to employ. Exemption depends upon the nature of the undertaking; it is cabined by the reason which underlies the inference."

That done by a policeman is in the highest sense governmental. *Glover* v. *Columbus,* 197 Miss. 467, 19 So. 2d 756; *Monette* v. *State,* 91 Miss. 662, 44 So. 989. Under these decisions, frankly, there is no power in the National government to interfere nor to declare this section of this statute unconstitutional.

We are conscious of the limitations placed by this court in *State of New York and Saratoga Springs Commission* v. *United States,* — U. S. —, 90 L. Ed. 265; *Case* v. *Bowles,* — U. S. —, 90 L. Ed. 398; and *S. R. A., Inc.* v. *State of Minnesota,* — U. S. —, 90 L. Ed. 663; but we submit that the law, as above quoted, is not altered insofar as that here at issue.

Hence, as to this governmental function, Mississippi is co-equal with the United States and in no way subordinate thereto, but if therein there be inferiority by reason of the Supremacy Clause, still Mississippi has not in any way indicated what law in this regard will be and until she does, under settled decisions here, this Court will not intervene.

Compare *American Federation of Labor* v. *Watson*, — U. S. —, 90 L. Ed. 715; and *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101, 89 L. Ed. 101.

(3) But should the Court disagree, then, with deference, Mississippi, through her administrative agencies is the judge of that whereasto this action is taken. *Railroad Commission* v. *Los Angeles*, 280 U. S. 145, 74 L. Ed. 234. Mississippi has certainly the same constitutional right as a private employer and when and if a private employer, for pecuniary gain, may not be compelled to involuntarily utilize union labor, then surely for the public welfare, the State may do that in its more important sphere and protect its people, just as a private individual may protect his money.

This issue is one whereasto, with deference, no provision may be found in the Federal Constitution, especially in view of the Tenth Amendment whereby the State has foregone that essential power requisite for its protection and preservation.

(4) We would concede that under the Thirteenth Amendment, prohibiting discriminations based on race, color and previous condition of servitude, expressly the States thereby forewent power to prescribe that their employees should be all Caucasians with exclusion of Negroes, all white men with exclusion of black and yellow, all free men and none slaves, but when the State comes within the ambit of the Fourteenth Amendment, there is no such foregoing of its sovereignty and there has never been property in public service—public welfare.

(5) And naught in *People* v. *Crane*, 214 N. Y. 154, affirmed in 239 U. S. 195, goes *contra* to the contention herein made, for McLeod consciously assumed a relationship under which he bound himself to forego his individual rights to purchase

where he pleased and do as he pleased, and was compelled to purchase from those who produced under the union label and act in the cause of labor when the cause of labor, as contended, conflicted with the cause of government. Quite irrespective of whether union or non-union was best, he must needs buy that union made and must allegiance bear to union policy even though therein he did not believe, and having voluntarily become "a union man" he was no longer a free man, but obligated to uphold tenets conflicting with the rights of those with whom he would come in contact and for whom he would act as a public servant. If the city might not anticipate possible conflicts between union and non-union, it could not adequately protect itself, and current conditions show that public protection presently requires non-affiliation.

Until the overruling of *Monette* v. *State,* 91 Miss. 662, 44 So. 989, by *Glover* v. *Columbus,* 197 Miss. 467, 19 So. 2d 756, McLeod would have been a public officer and by Section 250 of Mississippi Constitution it was provided:

> "All qualified electors and no others, shall be eligible to office, except as otherwise provided in this Constitution."

Under this section, the Legislature could not add to the qualifications of any officer. *McCool* v. *State,* 149 Miss. 82, 115 So. 121. But when McLeod was placed in the employee class to carry out that presently requisite, Mississippi had the right to exact unquestioned loyalty.

There is no need to discuss hypothetical cases. The issue before this Court is as to a specific person occupying a specific position with a specific obligation to perform.

There are certain cases cited whereto specific reference has not been made but they have been materially considered in the preparation of this response.

II

With deference, answered *supra*.

WHEREFORE, we respectfully submit that certiorari should not be granted.

Respectfully submitted,

MARCELLUS GREEN,
W. E. MORSE,
GARNER W. GREEN,
Jackson, Mississippi,
Counsel for Respondent.

GREEN & GREEN,
801-809 Standard Life Bldg.,
Jackson, Mississippi,
Of Counsel.

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

No. 35,803

J. R. McLeod, In Banc:

vs.

Civil Service Commission of Jackson, Mississippi

Per Curiam:

Before proceeding further with this case, the Court desires additional briefs from counsel *addressed and confined* to the following questions:

1. Did the court below err in overruling the appellant's motion for a trial de novo before a jury?

2. What portion, if any, of the transcript of the proceedings before the Civil Service Commission remained in the record after the court below had sustained the appellee's motions to strike this transcript, or a portion of it, from the record?

3. If a sufficient portion of that transcript remained in the record from which this Court can say that the appellant was discharged by the City Commission from the police force because he had become a member of a labor union, and this Court should be of the opinion that membership in such a union tended to injure the public service, was therefore just cause for appellant's discharge, and in a jury trial the court should so instruct the jury, what harm, if any, was done this appellant by the court below in refusing him such a trial?

4. After the court below declined to grant the appellant a jury trial and struck from the record the transcript of the proceedings before the Civil Service Commission, was it not incumbent on the appellant to introduce evidence before the court proceeded to a decision of the case? In other words, if he offered no evidence, was it not the duty

of the court to affirm the judgment of the Civil Service Commission?

5. If appellant says it was error to strike the transcript, does he not by virtue of that position concede that it ought now to be considered as a part of the record?

The brief of the appellee, changing the usual order for filing briefs, will be filed on or before Monday, March 26, 1945; reply of counsel for appellant to be filed within one week after the filing of brief for counsel for the appellee; rejoinder of counsel for appellee to be filed within five days after the filing of brief of counsel for the appellant. These dates may be changed by written agreement of counsel filed with the Clerk of this Court. Copies to be served in accordance with the rules of this Court.

IN THE SUPREME COURT OF MISSISSIPPI

No. 35,803

(Opinion rendered April 23, 1945)

15581 IN BANC:

J. R. McLEOD

vs.

CIVIL SERVICE COMMISSION OF JACKSON, MISSISSIPPI

SMITH, C. J.:

The appellant was a member of the police force of the City of Jackson, Mississippi. He was discharged by the Mayor and Commissioners of the City. An order of the City's Civil Service Commission approving this discharge was affirmed by the court below, and the appellant has brought the case to this Court.

The record filed by the Civil Service Commission in the court below includes a stenographer's transcript of evidence heard by the Commission.

When the case came on for trial in the court below, several motions were filed, among which is one by the appellee to strike the transcript of the evidence heard by the Civil Service Commission from the record, and one by the appellant for a trial by a jury. These motions were heard and decided together. The one for the appellee was sustained, and the one for the appellant was overruled, and a judgment was then rendered for the appellee, all of which appear in the same order or judgment.

The appellee challenges the efficacy of the appellant's appeal bond for this appeal, the constitutional validity of Chapter 208, Laws of 1944, which governs here, and the right of the appellee to an appeal to this Court. One of the appellant's complaints is the overruling of his motion for a jury trial.

The challenge of the constitutional validity of this statute is without substantial merit, and while no appeal is granted by it from the Circuit Court to the Supreme Court, such an appeal is within the provision of Section 1147, Code of 1942. The Civil Service Commission created by this statute is an agency of the municipality it serves. It has a number of duties to perform, one of which is, under Section 10 of the statute, to investigate the discharge of a policeman by the municipal authorities and determine whether or not the discharge was made for political or religious reasons or in good faith for cause. In other words, it is an agency of the municipality for enforcing the Civil Service requirements of the statute, and makes, when called on so to do, the City's final decision as to whether a policeman shall be discharged. The parties to such controversy from its inception to its final decision by the City's Civil Service Commission are the policeman and the City in its corporate capacity. This being true, the obligee in the appellant's appeal bond should have been the City of Jackson instead of, as here is, the Civil Service Commission of Jackson, Mississippi. This defect in the bond, however, is cured by Section 1673, Code of 1942.

The statute does not provide for the making of a transcript of the evidence before the Civil Service Commission, a part of the record on an appeal to the Circuit Court,

but expressly provides that "the accused shall have the right of trial by jury;" i. e., a trial de novo before a jury under the guidance and control of the trial Judge, each of these branches of the court discharging the same functions that it always does in trials therein. The appellant's motion for a jury trial was not necessary, for in the absence of waiver of that right, it was the duty of a trial Judge to try the case only with the assistance of a jury. For the error committed by the court below in trying this case without a jury, its judgment must be, and is

Reversed and Remanded.

J. R. McLeod

vs.

Civil Service Commission

Assignment of Errors

Comes the appellant in the above styled cause and assigns as error committed on the part of the Circuit Court of the First District of Hinds County, Mississippi, at the trial of said cause therein, in the following particulars:

1. The court erred in overruling the appellant's motion to quash and dismiss the charges and accusations against him, and to re-instate him in his former position as a policeman of the City of Jackson, Mississippi. Transcript, 275½.

2. The court erred in overruling the appellant's motion for a trial de novo before a jury. Transcript, 276.

3. The Court erred in overruling appellant's motion to strike all pleadings and proceedings filed on the part of and in behalf of the Civil Service Commission. Transcript, pages 272, 273 and 274.

4. The Court erred in overruling the appellant's motion to amend his notice of appeal. Transcript, 275.

5. The Court erred in sustaining the appellee's motion to strike the testimony taken before the Civil Service Commission. Transcript, pages 267, 268 and 269.

6. The Court erred in sustaining the appellee's motion to strike. Transcript, pages 270 and 271.

7. The Court erred in refusing the appellant any kind of a trial before a jury as provided by Chapter 208, Laws of 1944.

8. The Court erred in affirming the judgment of the Civil Service Commission, Transcript, pages 239 to 244, inclusive, said judgment of the Circuit Court, Tr., pages 277 and 278, being erroneous in the following particulars:

(a) It is contrary to the overwhelming weight of the evidence.

(b) It is contrary to the law applicable to the case.

(c) It is contrary to the overwhelming weight of the evidence and to the law applicable to the case.

(d) It denies to the appellant rights, privileges and immunities given and guaranteed to him by the laws and the Constitution of the State of Mississippi, and by the laws and Constitution of the United States.

(e) The judgment abridged the privileges and immunities of the appellant as a citizen of the United States, denied to him equal protection of the laws and deprives him of his liberty and property, without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

(f) The judgment deprived the appellant of his liberty and property without due process of law, in violation of Section 14 of the Constitution of the State of Mississippi.

9. The judgment is not based or founded upon any evidence of any kind whatever and is wholly unsupported by any such evidence and amounts to no more than an arbitrary exercise of judicial power.

Respectfully submitted,

(Signed) JOHN G. BURKITT,
(Signed) W. E. GORE,
Counsel for the Appellant.

I, W. E. Gore, of counsel for the appellant in the above styled cause do hereby certify that I have this day delivered to Mr. Garner W. Green, of counsel for the appellee, a true copy of the foregoing assignment of errors.

Witness my signature this February 9, 1945.

(Signed) W. E. Gore.

IN THE SUPREME COURT OF MISSISSIPPI

No. 35,803

In Banc:

J. R. McLeod

vs.

Civil Service Commission of Jackson, Mississippi

Per Curiam:

Before proceeding further with this case, the Court desires additional briefs from counsel *addressed and confined* to the following questions:

1. Did the court below err in overruling the appellant's motion for a trial de novo before a jury?

2. What portion, if any, of the transcript of the proceedings before the Civil Service Commission remained in the record after the court below had sustained the appellee's motions to strike this transcript, or a portion of it, from the record?

3. If a sufficient portion of that transcript remained in the record from which this Court can say that the appellant was discharged by the City Commission from the police force because he had become a member of a labor union, and this Court should be of the opinion that membership in such a union tended to injure the public service, was therefore just cause for appellant's discharge, and in a jury trial the court should so instruct the jury, what harm, if any, was

done this appellant by the court below in refusing him such a trial?

4. After the court below declined to grant the appellant a jury trial and struck from the record the transcript of the proceedings before the Civil Service Commission, was it not incumbent on the appellant to introduce evidence before the court proceeded to a decision of the case? In other words, if he offered no evidence, was it not the duty of the court to affirm the judgment of the Civil Service Commission?

5. If appellant says it was error to strike the transcript, does he not by virtue of that position concede that it ought now to be considered as a part of the record?

The brief of the appellee, changing the usual order for filing briefs, will be filed on or before Monday, March 26, 1945; reply of counsel for appellant to be filed within one week after the filing of brief for counsel for the appellee; rejoinder of counsel for appellee to be filed within five days after the filing of brief of counsel for the appellant. These dates may be changed by written agreement of counsel filed with the Clerk of this Court. Copies to be served in accordance with the rules of this Court.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

OCTOBER, 1945 TERM

No. 35,989

CITY OF JACKSON, *Appellant*

vs.

J. R. McLEOD

Assignment of Errors

The City of Jackson, Appellant, herein called City, respectfully represents that on the trial of the above entitled couse in the Circuit Court, Hinds County, First District,

Mississippi, manifest error occurred directly prejudicial to the City, which errors should be herein corrected, and of said errors so occurring, the following are assigned:

1

The Circuit Court should have sustained the City's motion for judgment non obstante, transcripts 21 and 22.

2

The Circuit Court should have sustained the City's motion for a new trial, transcripts 406 and 407.

3

The Circuit Court erred in not granting the City's motion for directed verdict, especially in this that it materially misconstrued its jurisdiction, saying:

> "Gentlemen, this Court will hold that the issue to be tried is whether or not the City Commission; that is, the Mayor and the two Commissioners, acted in good faith, and that what the Civil Service Commission did or did not do has no place in the trial of this case whatever. That is my understanding of what the Supreme Court said. That was not my idea of it in the beginning, but I have been corrected on it as I interpret the Supreme Court's opinion now." Transcript 130.

When the sole jurisdiction of the Circuit Court on this appeal under Section 10 of Chapter 208, Laws of 1944, provided:

> "The said circuit court shall thereupon proceed to hear and determine such appeal and the accused shall have the right of trial by jury; provided, however, that such hearing shall be confined to the determination of whether the judgment or order or removal, discharge, demotion or suspension made by the Commission (Civil Service Commission), was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds."

McLeod, in invoking the appellate jurisdiction of the Circuit Court specifically restricted his application therefor to the provision of the judgment and findings of the Civil Service Commission, transcript 109.

4

The Circuit Court erred in excluding from consideration by the jury of the following:

(a) The finding of the Civil Service Commission of the City of Jackson made pursuant to the hearing on July 11, 1944, especially that portion thereof reading:

> "We are mindful of the long and faithful services heretofore rendered by petitioner and the other employees affected by this decision, and have reached the conclusion that the best interests of the public will be promoted by reinstating any one or more of such employees to the same positions held by them respectively prior to their suspension and discharge provided such employees, within five days from the date hereof, will unqualifiedly renounce allegiance to and resign from membership in the labor union with which they became affiliated and will agree to hereafter refrain from becoming affiliated with any organization of a similar character. The governing body of the City of Jackson, therefore, is hereby ordered and directed to re-employ each and every one of said former employees upon their compliance with the conditions hereinabove stipulated and to thereafter certify to this Commission the action taken by it in compliance herewith, for approval or other appropriate action on the part of this commission. We further order and direct that such employees as are again employed *by* restored to full rights of seniority and pensions unaffected by their suspension and discharge but such employees as may be reemployed are held to be entitled to no remuneration covering the period during which they were not permitted to work."

(b) The ordinance of the City of Jackson reciting that appellee had not applied for reinstatement.

5

The proper discharge of official duty by Commissioners Hawkins and Taylor in the enactment of the ordinance of June 20, 1944, preclude relief despite the alleged conduct on the part of Mayor Walter A. Scott.

6

The Court erred in this proceeding in reinstating appellee and especially in declaring void each and every one of the (a) orders, (b) ordinances, (c) resolutions, and (d) the judgment of the Civil Service Commission, transcript 24.

7

The Circuit Court erred in admitting declarations of Walter A. Scott found at transcripts 367-369, whereto objections were made.

8

The Court erred in admitting the purposes undisclosed of defendant, McLeod and co-defendants, Bruton and Fulbright.

9

The Court erred in refusing, under the Constitution of Mississippi and of the United States, the inalienable right of the State of Mississippi, through its duly constituted officers to prescribe the qualifications of the police officers deemed essential for public welfare and thereover the Courts, under Mississippi's Constitution, are without right or judicial review, it being solely a question for the executive department as to whether or not an employee may become a member of a union. Said McLeod, not having so become, but having been precedently only a part to a preliminary organization, wherefrom due demand was made he refused to withdraw, claiming his rights to be paramount to those prescribed by the duly constituted authorities.

10

The Court erred in admitting all evidence whereto the City objected and its objection was overruled.

11

The Court erred in not excluding all evidence offered by McLeod whereto the City objected and whereasto the Court overruled the City's objection.

12

The Court erred in refusing Instruction No. "A" for the City, transcript 382.

13

The Court erred in refusing Instruction No. "B" for the City, transcript 382.

14

The Court erred in refusing Instruction No. "C" for the City, transcript 383.

15

The Court erred in refusing Instruction No. "D" for the City, transcript 383.

16

The Court erred in refusing Instruction No. "E" for the City, transcript 384.

17

The Court erred in refusing Instruction No. "F" for the City, transcript 384.

18

The Court erred in refusing Instruction No. "G" for the City, transcript 384.

19

The Court erred in refusing Instruction No. "H" for the City, transcript 385.

20

The Court erred in refusing Instruction No. "I" for the City, transcript 385.

21

The Court erred in refusing Instruction No. "J" for the City, transcript 386.

22

The Court erred in refusing Instruction No. "K" for the City, transcript 386.

23

The Court erred in refusing Instruction No. "L" for the City, transcript 387.

24

The Court erred in refusing Instruction No. "M" for the City, transcript 387.

25

The Court erred in refusing Instruction No. "N" for the City, transcript 388.

26

The Court erred in refusing Instruction No. "O" for the City, transcript 389.

27

The Court erred in refusing Instruction No. "P" for the City, transcript 389.

28

The Court erred in refusing Instruction No. "Q." for the City, transcript 390.

29

The Court erred in granting Instruction No. 1 for J. R. McLeod, transcript 391.

30

The Court erred in granting Instruction No. 2 for J. R. McLeod, transcript 391.

31

The Court erred in granting Instruction No. 3 for J. R. McLeod, transcript 392.

32

The Court erred in granting Instruction No. 4 for J. R. McLeod, transcript 392.

33

The Court erred in granting Instruction No. 5 for J. R. McLeod, transcript 393.

34

The Court erred in granting Instruction No. 6 for J. R. McLeod, transcript 393.

35

The oath which the union required McLeod to take, in these words:

> "I, ——— ———, pledge my honor to observe faithfully the constitution and laws of this local of the American Federation of State, County and Municipal Employees and the rules and regulations for the government thereof; not to make public any of the private proceedings of this local; to perform faithfully all the duties assigned to me; to support the products and services of organized labor by making purchases of such products and services; to so conduct myself at all times to bear true and faithful allegiance to the American Federation of State, County and Municipal Employees and to the labor movement in general.
>
> "I solemnly promise that I shall do all in my power to exalt and promote the cause of government service, aid in efforts to develop a more understanding public attitude toward public employment, and develop on the part of the general public a conviction of the value of public service."

divided his allegiance, or rather the City of Jackson, acting as it did, could so find and having so found, its finding is not subject to judicial review.

36

And for other causes to be assigned at the hearing.

Respectfully submitted.

CITY OF JACKSON,
(S.) W. E. MORSE,
(S.) GREEN & GREEN,
Attorneys.

I, Garner W. Green, of counsel for appellant, hereby certify that I have this day mailed, postage prepaid, to Messrs. John Burkett and W. E. Gore, Attorneys for appellee, each a true copy of the foregoing assignment of errors.

This 7th day of September, 1945.

(S.) GARNER W. GREEN.

STATE OF MISSISSIPPI,
Hinds County:

I, Tom Q. Ellis, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the above and foregoing pages contain a true and correct copy of Assignment of Errors, Questions Propounded by the Court, and Opinion of the Supreme Court of Mississippi in cause No. 35,803 J. R. McLeod versus Civil Service Commission of Jackson, Mississippi, and a true and correct copy of the Assignment of Errors in cause No. 35,989 City of Jackson versus J. R. McLeod, all of which appear of record in this office.

Witness my signature and seal of office, this the 14th day of May, 1946.

TOM Q. ELLIS,
Clerk, Supreme Court of Mississippi.
By MARY GODHOLD, D. C. [SEAL.]

IN THE SUPREME COURT OF THE UNITED STATES

J. R. McLeod, *Petitioner,*

vs.

City of Jackson

I, Virgil Griffith, Justice of the Supreme Court of the State of Mississippi, who as organ of that Court delivered the controlling opinion in the above entitled cause, do hereby certify that in disposing of said case, there was no Federal question, either under Amendment One or Amendment Fourteen to the Federal Constitution, considered or decided, the decision of the Court in reversing said judgment being entirely upon questions of local law. Under settled practice in Mississippi, no Constitutional question is usually considered unless the controversy demands its decision and in this case, that rule was followed and applied.

Witness my signature this the 13th day of May, 1946.

Virgil A. Griffith,
Justice.

State of Mississippi,
County of Hinds:

I, Tom Q. Ellis, Clerk of the Supreme Court of the State of Mississippi, said court being a court of record and having a seal, do hereby certify that Honorable Virgil A. Griffith whose genuine signature appears to the foregoing attestation, is now and was at the date thereof Justice of the Supreme Court of the State of Mississippi, and that the said Virgil A. Griffith is now, and was at the date of said attestation, duly commissioned and qualified.

Witness my signature and seal of office, at Jackson, Mississippi, this the 14th Day of May, 1946.

Tom Q. Ellis,
Clerk, Supreme Court of Mississippi.
By Mary Godhold, D. C. [seal.]

APPENDIX "B"

CHAPTER 208

Senate Bill No. 127

An Act to create a board of civil service commissions in all municipalities of the state, operating under a commission form of government, having a population of not less than fourteen thousand (14,000), according to the federal census of 1940, and having a full time fire and police department having paid members; to provide a civil service system based upon examination and investigation as to merit, efficiency and fitness for appointment, employment, and promotion of all officers and men appointed in said fire and police department and respective cities, and other purposes.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That there is hereby created in every municipality of the state, operating under a commission form of government, having a population of not less than fourteen thousand (14,000), according to the federal census of 1940, or having a population of not less than twenty-four thousand (24,000), according to the federal census of 1940 and situated in counties having a national military park, under whatever form of government, and having a full paid fire and police department, having paid members, a civil service commission which shall be composed of three members.

Appointment, Qualifications, Term of office.

The members of such commission shall be appointed by the city commission, and shall be three in number, and shall serve without compensation. Provided, however, that no person shall be appointed a member of such commission who is not a citizen of the United States, a resident of such city for at least five years immediately preceding such appointment, and an elector of the county wherein he resides. The terms of office of such commissioners shall be for six years, except that the first three members shall be appointed

for different terms, as follows; one to serve a period of two years, one to serve a period of four years, and one to serve a period of six years. Any member of such commission may be removed from office for incompetency, incompatability, dereliction of duty, or other good cause, by the appointing power. Provided, however, no member shall be removed until charges have been preferred in writing and a full hearing before the appointing power. Provided, further, that any member being so removed shall have the right of appeal, any time within thirty (30) days thereafter, to the circuit court and may demand a jury and such trial shall be confined to the determination of whether the order of removal, made by the appointing power, was, or was not, made in good faith and for cause. That two members shall constitute a quorum and the votes of any two members shall constitute a majority and be sufficient for the decision of all matters and transactions. This act shall not apply to cities operating under special charter and in which there is located a state supported college for women.

Those subject to civil service

SEC. 2. The provisions of this act shall apply to all municipalities of the state, as above set out, and all incumbents, and future appointees shall be subject to civil service, except, however, those appointees now and hereafter serving as extra members.

Appointment, promotions, discharges, etc.

SEC. 3. The provisions of this act shall include all full paid employees of the fire and/or police departments of each municipality coming within its purview, including the chiefs of those departments, all appointments to and promotions in said departments shall be made solely on merit, efficiency, and fitness, which may be ascertained by open competitive examination and impartial investigation. No person shall be reinstated in, or transferred, suspended, or discharged from any place, position or employment contrary to the provisions of this act.

SEC. 4. Immediately after appointment of the commission, which shall not be more than thirty (30) days after effective

date of this act, the commission shall organize by electing one of its members chairman, and hold regular meetings at least once each month, and such additional meetings as may be required for the proper discharge of their duties.

They shall appoint a secretary and a board of examiners, which board shall consist of the fire chief, the police chief, and a third member to be named by the commission, all of whom shall serve without compensation. The secretary shall keep the records and preserve all reports made to the commission, and also a record of all examinations held under the direction of the board of examiners, and perform such other duties as the commission may prescribe. The members of the board and also the secretary are also subject to suspension and discharge in the same manner as the commissioners.

Duties of the commission.

SEC. 5. It shall be the duty of the commission to make suitable rules and regulations not inconsistent with the provisions of this act. Such rules and regulations shall provide in detail the manner of conducting examinations, appointments, promotions, transfers, reinstatements, demotions, suspensions and discharges, and may also provide for any other matter connected with the general subject of personnel administration, and which may be considered desirable to further carry out the general purposes of this act. It shall have the power to conduct investigations, and make reports on all matters touching the enforcement and effect of the provisions of this act, and the rules and regulations prescribed hereunder. The commission shall have the power to investigate all complaints which must be reduced to writing, subpoena witnesses, administer oaths, and conduct hearings.

The commission shall maintain a list of applicants for positions.

SEC. 6. The commission shall keep a list of all members of the said police and/or fire department, and formulate methods of determining the relative qualifications of persons seeking employment in either of these two departments,

and give preference to those having the best qualifications, and to provide that men laid off because of curtailment of expenditures, reduction in force, and for like causes, shall be the last man or men, including probationers, that have been appointed to either the fire and/or police departments, until such reductions necessary shall have been accomplished. Provided, however, that in the event said department shall again be increased in number, those suspended shall be reinstated before any new appointments shall be made.

Adoption and induction of incumbents into civil service.

SEC. 7. For the benefit of the public service and to prevent delay, injury, or interruption therein by reason of the enactment of this act, all persons holding a position in the fire and/or police departments of any such municipality coming under the provisions of this act, including the chief thereof, when this act takes effect, who shall have served in such positions for a period of at least six months, last past, continuously, are hereby declared eligible for permanent appointment under civil service to the offices, positions or employments which they shall then hold, respectively, without examination or other act on their part, and not on probation, and every such person is hereby automatically adopted and inducted permanently into civil service, into such office, place, position or employment which such person then holds as completely and effectually to all intents and purposes as if said person had been permanently appointed thereto under civil service after examination and investigation. Provided, however, that those persons who have previously left their positions to participate in the armed forces of the United States shall have preference in reemployment and enjoy the rights and privileges of this act as if their services had not been terminated.

Applicants.

SEC. 8. All applicants for a position of any kind under civil service must be a citizen of the United States and an elector of the county in which he resides and must have so

resided for a period of at least three years immediately preceding the filing of his application.

Tenure of office and manner of discharge.

SEC. 9. The tenure of everyone holding an office, place, position or employment under the provisions of this act shall be only during good behavior, and any such person may be removed or discharged, suspended without pay, demoted or reduced in rank, or deprived of vacation privileges, or other special privileges, for any of the following reasons:

Incompetency, inefficiency, or inattention of duty; dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public, or a fellow employee, or any other act of omission, or commission tending to injure the public service.

Removal.

SEC. 10. No person in the classified civil service who shall have been permanently appointed or inducted into civil service under provisions of this act, shall be removed, suspended, demoted or discharged except for cause, except such persons as may be employed to fill a vacancy caused by the absence of a fireman or policeman while in service as a member of the armed forces of the United States, but as to other persons, and only upon the written accusation of the appointing power, or any citizen or taxpayer, a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission. The chiefs of the fire and/or police department may suspend a member pending the confirmation of the suspension by the regular appointing power under the act which must be within three days. Any person so removed, suspended, demoted or discharged may within ten days from the time of his removal, suspension, demotion or discharge, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. The investigation shall be confined to the determination of the question of whether such removal, suspension, demotion or discharge was or was not

made for political or religious reasons and was or was not made in good faith or cause. After such investigation the commission may, if in its estimation the evidence is conclusive, affirm the removal, or if it shall find that the removal, suspension, or demotion was made for political or religious reasons, or was not made in good faith for cause, shall order the immediate reinstatement or re-employment of such person in the office, place, position, or employment from which such person was removed, suspended, demoted, or discharged, which reinstatement shall, if the commission so provides in its discretion, be retroactive, and entitle such person to pay or compensation from the time of such removal, suspension, demotion or discharge. The commission upon such investigation, in lieu of affirming the removal, suspension, demotion or discharge, may modify the order or removal, suspension, demotion or discharge by directing a suspension, without pay, for a given period and subsequent restoration of duty, or demotion in classification, grade, or pay, the findings of the commission shall be certified, in writing to the appointing power, and shall be forthwith enforced by such officer.

All investigations made by the commission pursuant to the provisions of this section shall be by public hearing, after reasonable notice to the accused of the time and place of such hearing, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his defense. If such judgment or order be concurred in by the commission or a majority thereof, the accused may appeal therefrom to the circuit court of the county wherein he resides. Such appeal shall be taken by serving the commission, within thirty days after the entry of such judgment or order, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such judgment or order, be filed by the commission with such court. The commission shall, within ten days, after the filing of such notice, make, certify and file such transcript with such court. The said circuit court shall thereupon proceed to hear and determine such appeal and the accused shall have the right

of trial by jury; provided, however, that such hearing shall be confined to the determination of whether the judgment or order or removal, discharge, demotion or suspension made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

Fixing of compensation.

SEC. 11. The fixing of the compensation of every employee coming under the provisions hereof shall remain vested, by law, at and prior to the taking effect of this act, and nothing herein contained shall infringe upon the power and authority of any such person to fix the salaries and compensation of all employees employed hereunder.

Political services disregarded and prohibited.

SEC. 12. No person holding any office, place, position or employment subject to civil service, is under any obligation to contribute to any political fund or to render any political service to any person or party whatsoever, and no person shall be removed, reduced in grade or salary, or otherwise prejudiced for refusing so to do, but if such person actively participates in political activity in any primary or election in a municipality where employed, it shall be deemed cause for removal. No public officer, whether elected or appointed, shall discharge, promote, demote or in any manner change the official rank, employment or compensation of any person under civil service or promise or threaten so to do, for giving or withholding, or neglecting to make any contribution of money, or service, or any other valuable thing, for any political purpose.

SEC. 13. The only constituted authorities of each and every city coming within the purview of this act, shall provide the commission with suitable and convenient rooms and accommodations and cause the same to be furnished, heated and lighted and supplied with all office supplies and equipment necessary to carry on the business of the commission and with such clerical assistance as may be necessary, all of which is to be commensurate with the number of per-

sons in each such city coming within the purview of this act; and the failure upon the part of the duly constituted authorities to do so, shall be considered a violation of this act and shall be punishable as such.

SEC. 14. That the provisions of this act shall not apply to nor be applicable to municipalities in which there is located a harbor or port of entry where commodities are exported to foreign nations and where there is maintained a channel or harbor or port to a depth of not less than 26 feet.

Constitutionality of act.

SEC. 15. If any section, subsection, subdivision, sentence, clause or phrase of this act, shall for any reason be held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act.

Repeal of conflicting acts.

SEC. 16. All acts and parts of acts in conflict with the provisions of this act are hereby repealed insofar as they conflict with the provisions of this act.

SEC. 17. That this act take effect and be in force thirty (30) days after its passage.

Approved March 22, 1944.

APPENDIX "C"

BEFORE THE BOARD OF POLICE COMMISSIONERS,
CITY OF ST. LOUIS, MISSOURI

CHARGES AND SPECIFICATIONS

vs.

PATROLMAN RICHARD T. MILLER

(Violating Rule 23, Section 342)

CHARGES AND SPECIFICATIONS

vs.

PATROLMAN BERNARD T. CASSERLY

(Violating Rule 23, Section 342)

DECISION BY THE BOARD

Pursuant to the rules of the Police Manual, revised and compiled by the Board of Police Commissioners, December, 1928, the Board, on December 18, 1945, held a hearing on the charges and specifications filed against Patrolmen Richard T. Miller and Bernard T. Casserly, both of the Traffic Squad of the Police Department of the City of St. Louis, Missouri.

Separate charges and specifications were filed against each of the said officers. The charges and specifications, however, are identical in each case and the issues are the same with respect to each officer. Therefore, our ruling can be made in one decision.

In Charge 1 the officers are charged with violating Rule 23, Section 342, of the Police Manual, revised and compiled by the Board in December, 1928, and the amendments thereto, by participating in the organization of a union.

There are two specifications contained in Charge 1. In Specification 1 the officers are charged with a continued participation, commencing on or about October 20, 1945, in organizing members of the Police Force into a union known as Local 549 of the American Federation of State, County

and Municipal Employees, a labor union affiliated with the American Federation of Labor.

In Specification 2 the officers are charged with participation in the organization of the above mentioned Local 549, and with attempting to induce other members of the Police Department of the City of St. Louis to become members of the Police Force a letter dated December 3, 1945, which is set out verbatim in the specification.

In Charge 2 the officers are charged with violating Rule 23, Section 342, of the Police Manual by becoming members of a union.

In Specification 1 under this charge the officers are charged with becoming members of the above mentioned Local 549 on or about the 20th day of October, 1945, and with now being members of the Local and with having taken an oath as members of the Local, which is contrary to, inconsistent with, derogatory of and repugnant to the oath which they took upon becoming members of the Police Force. The oath taken by the officers as members of the Local is set out in the specification as well as the oath taken by the officers in becoming members of the Police Force.

Rule 23, Section 342, of the Police Manual, revised and compiled by the Board of Police Commissioners, December, 1928, provides as follows:

> "342. Other Organizations Forbidden—All members and employes of the Force are forbidden, under pain of dismissal to participate in the organization of or to become members of any association, meeting, union, or any organization of members or employes other than the Police Relief Association, the Police Funeral Association and the St. Louis Police Pension Fund Association, each of which has been duly authorized to perform certain necessary functions."

Officers Miller and Casserly have each admitted their active participation in the organization of Local 549, and their continued membership in the Local from the inception of its organization. They are respectively the presi-

dent and secretary of the Local and have been in the very front of the organization movement.

The sole defense submitted by the officers to the charges filed is the claim that Rule 23, Section 342, is invalid because it deprives them of their alleged constitutional rights, under the State and Federal Constitutions, to organize and be members of a union, and because of the alleged claim that the rule is arbitrary and unreasonable.

Rule 23, Section 342, is within the statutory powers of the Board of Police Commissioners "to make such rules and regulations, not inconsistent with law, as it may judge necessary for the appointment, employment, uniforming, disciplining, trial and government of the police force." (Sec. 7695, R. S. No. 1939)

The rule in question has the same presumption of validity as is possessed by ordinances and statutes.

The officers claim that the rule violates Section 29 of Article 1 of the Constitution of Missouri of 1945, which reads as follows:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing."

The section quoted does not specifically exclude or include the State or its agencies. It is a familiar and well settled principle of statutory and constitutional construction that words used in such instruments defining or limiting rights and interests do not apply to the government or governmental agencies unless they are expressly named or included by necessary implication.

The National Labor Relations Act which is the pattern for the language used in the constitutional provision expressly exempts employees of all governmental agencies. Statutes adopted in many states following the pattern of the Wagner Act provide for the same exemption.

Furthermore, members of the Police Force are not employees. They are specifically declared to be officers of the State of Missouri, as well as of the City of St. Louis. Sec. 7711, R. S. Mo. 1939. They are public officers charged with the enforcement and execution of the police powers of the state.

There is a vast distinction between public officers and employees. This distinction has been repeatedly pointed out in the decisions of our own Supreme Court.

We therefore conclude that Section 29 of Article 1 of the Constitution of Missouri of 1945 has no bearing on the issue before us.

The claim that Rule 23, Section 342, deprives the officers of their rights under the Federal Constitution is without substance. No right is granted under the Federal Constitution for state officers to organize or to be members of a union. The rule is directed at the conduct of public officers which is deemed inimical and dangerous to the public welfare. It is not a denial of free speech or any other right granted under the State or Federal Constitutions.

It is, nevertheless, claimed by the officers that the rule is arbitrary and unreasonable. Similar rules have been upheld as valid and reasonable by the courts of several states as applied to the field of public officers and employees of governmental agencies. We have been unable to find any case in which such a rule has been declared invalid.

Rule 23, Section 342, was enacted in 1920 and made its first appearance in the Police Manual adopted by the Board of Police Commissioners July 14, 1920, being numbered Rule 23, Section 375, in the 1920 manual. When that rule was adopted the Boston police strike, which had occurred in September of 1919, was undoubtedly fresh in the memory of the Board. That strike is part of our national history and is a matter of general knowledge. The strike of the Boston police grew out of its organization of a union affiliated with the American Federation of Labor, which the Police Commission of Boston refused to sanction.

Practically the entire membership of the force then went out on a strike with disastrous consequences to the city from unchecked criminal activities.

Governor Calvin Coolidge immediately called out the State Guard to police the city and an entirely new police force was organized. Governor Coolidge issued his famous statement, "There is no right to strike against the public safety by anybody, anywhere, anytime."

President Woodrow Wilson issued a public statement on the Boston strike, vigorously supporting the stand taken by Governor Coolidge. President Wilson said:

> "A strike of policemen of a great city, leaving that city at the mercy of an army of thugs, is a crime against civilization. In my judgment the obligation of a policeman is as sacred and direct as the obligation of a soldier. He is a public servant, not a private employee, and the whole honor of the community is in his hands. He has no right to prefer any private advantage to public safety."

The Executive Council of the American Federation of Labor which, as we understand, is the highest legislative body of that organization has recognized the dangers inherent in the situation and has refused to grant charters to unions of police officers. We cannot understand how that ruling has been by-passed by the issuance of the charter to Local 549 through the American Federation of State, County and Municipal Employees.

But, it is claimed that the members of Local 549 are pledged by the terms of their charter to refrain from striking, and that thus this phase of the danger of union activity is removed or alleviated. It was admitted at the hearing that the Constitution and Laws of the above mentioned federation contains no prohibition against strikes.

History and common sense teach us that this self denial may be very temporary and fugitive. Particularly is this true when we consider that the right to strike is of the very essence and strength of the union movement. It is a right for which the unions have fought and sought recognition from the public and the courts. The great union organizations and their leaders have all taken the position that they will not permit any diminution of that right.

We need only to read today's newspapers to realize how sacred the right to strike is considered by the unions. In connection with present day labor troubles President Truman has proposed legislation to set up fact-finding boards, together with a provision that strikes would be illegal during a limited thirty-day fact-finding period. The proposed

legislation has met with bitter denunciation from the leaders of all national union organizations. Characteristic is the statement of Philip Murray, President of the CIO:

> "The United Steelworkers of America is firmly and unalterably opposed to any legislation which makes strikes unlawful even though for a limited time and penalizes strikers through criminal prosecution. Compulsion to work—regardless for how brief a period—is but the first step toward industrial serfdom."

The oath taken by Officers Miller and Casserly in becoming members of Local 549 requires them "at all times to bear true and faithful allegiance to the American Federation of State, County and Municipal Employees and to the labor movement in general."

There is necessarily implicit in this oath the duty to support the trade union objectives which are realized by the strike, the boycott and the picket line, the essential weapons of the union.

Even if we were to indulge ourselves in the fatuous belief that police officers as members of the union affiliated with the American Federation of Labor could forever deny to themselves the benefits which they would see being realized from day to day in the use of these weapons by their sister unions, is it possible to contend that they would also stand aloof and remain impartial in the controversies and conflicts which arise from the use of such weapons by their sister unions?

Unfortunately, as we all know, these major disputes often lead to violence and to situations in which police officers must maintain peace and order.

On the subject before us, Governor Phil M. Donnelly issued a historic statement on November 23, 1945. We quote the last three paragraphs of the statement:

> "At such times, emotions run high, reason abdicates and violence often results. The peace officer must be in a position that will be respected and above suspicion by both sides in such a controversy. He should never allow himself to be placed in a position where his

motives or his actions may be challenged. He should be above all accusations.

"History reveals the dangers inherent in the organizing of peace officers into unions. However mild the present objectives of such organizations or locals might be, no one can say how future events or future leadership might shape the policies and change the objectives. The better policy will be to avoid all semblance of temptation and danger and to adhere strictly to the highest and noblest ideals of the peace official, sworn to protect the public with his life if necessary.

"Only such individuals as are willing thus to consecrate themselves to the public welfare should become members of a police force. Only such members are worthy of their trust. If this is demanding a great deal of police officers, it should be remembered that theirs is a sacred trust and they are honored, respected and implicitly obeyed because they are selected to uphold that trust."

We are firmly convinced that membership in a union affiliated with a national labor organization involves an abdication of the high duties and responsibilities referred to by Governor Donnelly. We also believe that it would mean a loss to the police officers of public esteem and confidence.

But it is argued that a union such as that involved in the case before us is the sole effective agency through which necessary improvements in salaries and working conditions of police officers can be effected. This premise is emphatically denied. This Board has always been open and will always remain open to members of the police force and any committees they may select for discussion and consideration of grievances. It must, of course, be recognized that the Board of Police Commissioners is a governmental body which is subject to the limitations placed upon it by law. Salaries and hours of employment are fixed by the legislature. Nevertheless, there are adjustments which the Board can and will make in proper cases.

Neither can we indulge in the wholly unwarranted assumption that our legislature, our Governor or the City of

St. Louis, which pays the salaries of our police officers, will give police officers fair treatment only when they are subjected to the force and influence resulting from membership in a national labor union.

The reckless statement has been made and repeated that the organization of Local 549 has already provided benefits to members of the police force, as witness the uniform allowance made by this Board and the introduction of a bill in the legislature to increase salaries of the force. We cannot answer for the legislature as to what prompted the proposed bill. We do know, however, that, as a matter of fact, similar bills have been presented to the legislature at previous sessions before there was any union organization. A bill approving increases in salaries was enacted at the session of the legislature of 1944.

The matter of allowance for uniforms was under consideration by this Board before the Board had any knowledge of the union organization movement. Having reached the conclusion that such an allowance should be made and was within our legal powers, we did not deem it consistent with the high trust of our duties to defer action because there was a chance the union and its adherents might make capital out of such action.

Our Board has been serving for only six months. During that time many important problems have been presented in connection with the administration of the Police Department of Metropolitan St. Louis, to which we have given ungrudgingly our time and careful consideration. We are justly proud of the splendid personnel of the police force of our City. From the patrolmen to the commanders they are doing their duty day by day with a full sense of their responsibilities as public officers.

They are impressed with the fact that a police officer is something more than a job holder. He is charged with a public trust. He is a civilian soldier, bound by the soldier's code of loyalty, obedience and discipline. The unexcelled morale of the Department and the mutual confidence between all ranks have produced a splendid record of efficiency in law enforcement and crime detection, with all the resultant benefits to the welfare and security of our citizens.

The organization of Local 549 and membership in the local are fraught with serious dangers to the morale and efficiency of the Police Department. For the first time a police officer would be required to weigh his duties and oath as a police officer against his duties and oath as a member of the Union.

As a public officer he should be free from the dangers and distractions of such divided loyalties. Rule 23, Section 342, prevents such harmful tendencies and effects. It is a reasonable and valid regulation necessary and beneficial to the government and discipline of the police force.

We find from the evidence adduced at the hearing that Patrolman Richard T. Miller and Patrolman Bernard T. Casserly have violated and are continuing to violate Rule 23, Section 342, of the Police Manual, in the particulars set forth in Charges 1 and 2 and Specifications 1 and 2 of each of the said charges against each of the two police officers. We therefore find Patrolman Richard T. Miller and Patrolman Bernard T. Casserly and each of them guilty as charged in Charges 1 and 2 and Specifications 1 and 2 of each of the said charges filed respectively against the said officers, and we order and direct that Patrolman Richard T. Miller and Patrolman Bernard T. Casserly should each be and they are hereby dismissed from the Police Force of the City of St. Louis.

By the Board:

THOMAS H. COBBS,
FRANCIS L. GEORGE,
BEN L. LIBERMAN,
Members of the Board of Police Commissioners.

December 19, 1945.